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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-166

RICHARD JOYCE SMITH, TRUSTEE
OF THE PROPERTY OF THE
NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,
DEBTOR,

CROSS-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,

CROSS-APPELLEES

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

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JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

This jurisdictional statement is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and the "New Haven," respectively). Since July, 1961, the New Haven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, before the

United States District Court for the District of Connecticut (Circuit Judge Robert P. Anderson sitting by designation). On December 31, 1968, the New Haven Trustee (together with his then co-Trustee) conveyed substantially all of New Haven's assets to Penn Central Transportation Company ("Penn Central") in exchange for a then-to-be judicially determined consideration comprised of cash, mortgage bonds and shares of common stock of Penn Central. See *New Haven Inclusion Cases*, 399 U.S. 392 (1970). The New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1 and 2), which has been in reorganization under §77 of the Bankruptcy Act since June 21, 1970, and is also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3) to secure the total unpaid portion ($123,809,404) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra.* In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company[1] common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

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[1]Penn Central Company is the holding company which owns 100% of the stock of Penn Central. The 956,000 shares held by the New Haven Trustee pending final adjudication of New Haven's plan of reorganization represent 4% of the outstanding shares.

THE OPINION BELOW

The New Haven Trustee cross-appeals from so much of an Order, dated June 25, 1974, of a three-judge court convened pursuant to 28 U.S.C. §§2282 and 2284 in the United States District Court for the Eastern District of Pennsylvania (the "court below") as denied the relief sought by cross-appellant.

The Opinion of the court below pursuant to which the Order was entered has not yet been officially reported. Copies of the Opinion and Order are separately bound in the Joint Appendix hereto, at pp. 9-83.[2]

JURISDICTION

This action was brought pursuant to 28 U.S.C. §§1331, 1337, 1651, 2282, 2284 and 2321-2325, to enjoin enforcement of various provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 87 Stat. 985, 45 U.S.C. §§701 *et seq.* (the "RRRA") for repugnance to the Constitution of the United States. In addition, declaratory relief was sought pursuant to 28 U.S.C. §§2201-02.

The principal appellants from the decision of the court below are the United States of America, United States Railway Association ("USRA"), Claude S. Brinegar, Secretary of the United States Department of Transportation and the Interstate Commerce Commission ("ICC") (herein collectively referred to as the "governmental appellants") and Robert W. Blanchette, Richard C. Bond, and John H. McArthur[3], Trustees

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[2]References to documents contained in the Joint Appendix will be identified by the letters "JA" followed by the appropriate page numbers.

[3]Subsequent to commencement of the action, George P. Baker, an original Trustee of Penn Central, resigned and John H. McArthur was appointed in his stead.

of Penn Central, intervening defendants pursuant to Rule 24, Fed. R. Civ. P. (the "Penn Central Trustees").[4]

Since the Order of the court below enjoined certain of the governmental appellants from enforcing certain provisions of the RRRA on grounds of repugnance to the United States Constitution, the governmental appellants and the Penn Central Trustees each have a statutory right of direct appeal to this Court under 28 U.S.C. §1252 and also under 28 U.S.C. §1253.

The New Haven Trustee, as a "party who has received notice of appeal under this section" within the meaning of the penultimate sentence of 28 U.S.C. §1252, is directed by statute to "take any subsequent appeal or cross-appeal to the Supreme Court." 28 U.S.C. §1252.

The New Haven Trustee's notice of appeal was filed with the Clerk of the United States District Court for the Eastern District of Pennsylvania on July 3, 1974, and a copy thereof is printed at JA 385.

The governmental appellants and the Penn Central Trustees support the constitutionality of the RRRA, and therefore are the cross-appellees here. It is understood that the cross-appellees do not challange the jurisdiction of the Court to hear this cross-appeal.

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[4]The governmental appellants filed notices of appeal on July 17, 1974 (USRA), July 22, 1974 (United States), and July 24, 1974 (Brinegar) in *Smith v. United States* (JA 386-88). Defendants Stafford (Chairman of the ICC), Schultz (formerly Secretary of the Treasury) and the ICC, named as party defendants in the *Connecticut General* and/or *Penn Central Co.* cases, filed notices of appeal on July 24, 1974 (JA 389-90). The Penn Central Trustees' notice of appeal was filed on July 1, 1974 (JA 384). The New Haven Trustee's notice of appeal was filed on July 3, 1974 (JA 385).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution and Statutes are believed to be involved in the determination of this case:

United States Constitution:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes:

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*

Extracts of the pertinent constitutional and statutory provisions will be set forth as an Appendix to the New Haven Trustee's Brief. The complete text of the RRRA is printed at JA 391 *et seq.*

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the RRRA are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA, offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §§303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

STATEMENT OF THE CASE

On January 2, 1974, the RRRA was signed into law by the President.[5] On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, USRA, and Secretary of Transportation Brinegar. The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania (*Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other governmental defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, pursuant to §1404(a), from the District of Columbia.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional

[5]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

on the assumption of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his complaint.[6] The United States and the other governmental defendants, and the Penn Central Trustees, each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[7] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order") (JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any

[6]See New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (E.D. Pa. C.A. No. 74-1107, Doc. No. 4, May 2, 1974; JA 258), pp. 1-8 for listing of issues included in the Motion for Summary Judgment.

[7]Ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 317-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service which may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing or taking any action to implement so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[8] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment of the Constitution to the extent it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographically throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in

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[8]This portion of the order was entered *sua sponte* as none of the plaintiffs sought this relief.

disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that the issue of the facial constitutionality of the compulsory conveyance provisions of the RRRA was not required to be adjudicated on account of alleged prematurity and lack of ripeness.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Art. I, Sec. 8, Cl. 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[9] which they held to be void for lack of geographical uniformity (Concurring opinion of Fullam, J., Part II; JA 61-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the constitutional defect of the RRRA's non-appli-

[9]RRRA, §207(b), third sentence, Clause (2).

cability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, on this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) Clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

SUBSTANTIALITY OF QUESTIONS PRESENTED

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. While the RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court, this judgment was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 2, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur, without making provision for payment to the Penn Central estate of just compensation in respect of these operating deficits and consequent erosion. While the decision of the Court below provides an obstacle to the implementation of an unconstitutional taking, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues which it treated as "premature," which went to the constitutional defects, both facial and as applied to Penn Central, of the compulsory con-

veyance provisions of the RRRA, are inherently important issues which require concurrent resolution. If this Court merely sustains the judgment below without addressing the constitutionality of the compulsory conveyance provisions of the RRRA, a correction by Congress of only the constitutional defects in the RRRA found by the court below, without remedying the more basic constitutional defect asserted in this cross-appeal, would produce seriously adverse consequences to both the Penn Central creditors and the public interest. This cross-appellant under such circumstances would be required to commence still another action to declare such an amended RRRA unconstitutional on the grounds which are urged on this cross-appeal, thereby resulting in still another round of appeals to this Court from either the grant or denial of an injunction in a subsequent §2282 action attacking the RRRA. Broad public and private considerations, as well as objectives of judicial economy, thus favor the adjudication of this cross-appeal at this time.

CONCLUSION

This Court has jurisdiction of this cross-appeal, and substantial questions are presented requiring plenary consideration. If the Court notes probable jurisdiction of the related appeals by the governmental appellants and the Penn Central Trustees, it should similarly note probable jurisdiction of this cross-appeal.

Respectfully submitted,

August 23, 1974

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REGIONAL RAIL REORGANIZATION CASES

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property
of
The New York, New Haven and Hartford
Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

*ON CROSS-APPEALS FROM THE
JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA*

BRIEF OF
CROSS-APPELLANT

INTRODUCTION

This brief is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). Since July, 1961, the New Ha-

ven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205; however, since December 31, 1968 New Haven's former railroad has been operated by Penn Central Transportation Company ("Penn Central"), pursuant to the inclusion approved by this Court in *Penn Central Merger Cases*, 389 U.S. 486 (1968) and *New Haven Inclusion Cases*, 399 U.S. 392 (1970). On June 21, 1970 Penn Central filed a petition seeking reorganization under §77. The New Haven Trustee is presently owed $123,809,404 by Penn Central, exclusive of interest, out of a total purchase price, approved in *New Haven Inclusion Cases*, of $174,635,899, and his standing in this case is predicated upon that unpaid claim. The New Haven Trustee, together with certain other plaintiffs (whose actions were consolidated for oral argument and disposition), prevailed in the court below as to certain of the constitutional contentions presented for decision; however the court below failed to reach other, even more basic, constitutional issues. As a result, although an appellee as to the appeals taken by the defendants below, the New Haven Trustee is a cross-appellant as to so much of the order below as denied in part his claim for relief.

OPINIONS BELOW

The opinions and order of the district court have not yet been reported; they are reproduced in the Joint Appendix of the Appellants and Appellees, pp. 9-83 (hereinafter cited as "JA"). The instant case, *Smith v. United States* (E.D. Pa. Civil Action No. 74-1107) was consolidated for oral argument and disposition below with two related cases, *Connecticut General Ins. Corp. v. United States Ry. Ass'n* (E.D. Pa. Civil Action No. 74-189) and *Penn Central Co. v. Brinegar* (E.D. Pa. Civil Action No. 74-1149).

JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C. §1252. On August 23, 1974, the New Haven Trustee filed a Jurisdictional Statement relating specifically to the jurisdiction of this Court to hear this cross-appeal. By stipulation of counsel for the New Haven Trustee as cross-appellant and all other appellants and appellees, this Brief is being filed in advance of the determination of the Court as to probable jurisdiction in order to facilitate an expedited briefing and hearing schedule as sought by all the parties.

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the Regional Rail Reorganization Act, 45 U.S.C. §§701 *et seq.* ("RRRA"), are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment of new legislation deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CROSS-APPEAL

The constitutional provisions and statutes involved in this cross-appeal include:[1]

Constitution of the United States:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes of the United States:

Regional Rail Reorganization Act, Public Law 93-236, 45 U.S.C. §§701 *et seq.* (JA 391)

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

STATEMENT OF THE CASE

Penn Central is the successor to The Pennsylvania Railroad Company and The New York Central Railroad Company, whose merger was finally approved by this Court in *Penn Central Merger Cases, supra.*[2] As one of the conditions of the merger, the Pennsylvania and New York Central Railroads agreed to purchase the assets of the New Haven, which had been in reorganization under §77 of the Bankruptcy Act since 1961 (United States District Court for the District of Connecticut, No. 30226). Penn and Central effected their merger on February 1, 1968; and New Haven's

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[1]The text of the Regional Rail Reorganization Act of 1973 is printed in full at JA 391 *et seq.* The text of pertinent provisions of the United States Constitution and of Section 77 of the Bankruptcy Act is printed in the Appendix hereto at A-1 *et seq.*

[2]See also *Baltimore & Ohio R.R. v. United States*, 386 U.S. 372 (1967), refusing to approve the initial decision of the Interstate Commerce Commission ("ICC") until it afforded adequate protection to certain eastern railroads not to be included in the merger.

railroad assets were conveyed to Penn Central on December 31, 1968, by Richard Joyce Smith, Trustee of the New Haven (together with his then co-Trustee), subject to later judicial review of adequacy of the purchase price ordered by the ICC.

On June 21, 1970, Penn Central filed for reorganization under §77 of the Bankruptcy Act (United States District Court for the Eastern District of Pennsylvania, Bky. No. 70-347). Eight days later, this Court indicated approval of the terms fixed by the New Haven Reorganization Court (under §77(e) proceedings on New Haven's plan of reorganization) for sale of New Haven's assets to Penn Central, but reversed and remanded for further proceedings to consider the effect of Penn Central's bankruptcy on the value of the Penn Central's payment, particularly its common stock, included in the consideration. *New Haven Inclusion Cases, supra.*

The early stages of the Penn Central §77 proceedings were devoted to an effort by the Penn Central Trustees to identify the problems which had to be overcome in order to achieve an earnings-based reorganization as contemplated by §77. The initial cash crisis was temporarily alleviated by orders of the United States District Court for the Eastern District of Pennsylvania, Judge John P. Fullam ("Penn Central Reorganization Court") permitting deferrals of interest on debt (other than equipment debt), and most leased line rentals and real estate taxes.[3] In addition, acting

[3]Through December 31, 1973, the following amounts had been deferred: interest, $104 million; leased line rentals, $101 million; taxes, $241 million. Stipulation as to Factual Matters (printed at JA 317-24; hereinafter cited as "Stip. Fact"), ¶¶12, 13, 14. The total of such deferrals was $446 million as of December 31, 1973, and represents a priority administration claim. This total does not include $57 million of interest on $300 million of notes secured by pledge of Penn Central's stock interest in Pennsylvania Co., a non-rail subsidiary. If the interest on the notes secured by the Pennsylvania Co. stock is included, deferrals amounted to $503 million as of December 31, 1973.

pursuant to §77(c)(3), the Penn Central Reorganization Court approved $100 million of Trustees' Certificates,[4] which in order to be marketable required the guarantee of the United States authorized by §3 of the Emergency Rail Services Act of 1970, 45 U.S.C. §662.

A series of Penn Central Trustees' Reports dated February 10, 1971, March 22, 1971, September 17, 1971, February 15, 1972, April 1, 1972, July 1, 1972, October 1, 1972, January 1, 1973, February 1, 1973, and April 3, 1974[5] disclose the history of the Trustees' efforts to achieve a private income-based reorganization of Penn Central. The Trustees began by asserting that Penn Central could be reorganized if certain conditions, not within their control, were met.[6] Subsequent reports spelled out a lack of success in implementing these conditions. Finally, in their January 1, 1973 and February 1, 1973 Reports, the Trustees acknowledged that reorganization would not be possible without a *government grant* (not merely financial assistance by way of loans or guarantee of borrowings) on the order of $600 million to $800 million.

There followed an attempt by the Trustees to implement certain crew-consist changes (which had been the subject of exhaustive, but unproductive, proceedings under the Railway Labor Act), that resulted

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[4] *In re Penn Central Transportation Co. (Order No. 124)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[5] These Trustees' Reports are reproduced as Documents 1 through 10 in the Joint Documentary Submission in the court below, ten copies of which have been filed with the Clerk of this Court.

[6] The New Haven Trustee on March 10, 1972 advised the Penn Central Reorganization Court that in his opinion the Penn Central Trustees' predictions as to reorganizability of Penn Central on an income basis were unduly optimistic. See Doc. No. 11 in the Joint Documentary Submission.

in a strike on February 8, 1973. Congress responded by enacting Senate Joint Resolution No. 59, which imposed a 90-day moratorium on both the work-rule changes and the strike.[7]

Shortly thereafter, acting *sua sponte*, the Penn Central Reorganization Court entered an opinion and order regarding the status of reorganization efforts. *In re Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa. 1973). Judge Fullam concluded as follows:

> "Whether the constitutional limit [of erosion] has been exceeded depends primarily upon how the remaining assets are to be valued; and this in turn may well depend upon how those assets are to be used at the conclusion of this reorganization. Under any view of the matter, *it seems clear that the point of unconstitutionality is fast approaching, if it has not already arrived.*
>
> "The essence of §77 of the Bankruptcy Act is that the legal remedies normally available to creditors may be held in suspension for a *reasonable time* in order to permit rehabilitation of the enterprise. Whenever it appears that there is *no genuine likelihood of ultimate success, the legal and constitutional justification for restraining creditors from exercising their normal remedies disappears.*
>
> "It has long been apparent that the particular problems of Penn Central cannot be completely divorced from problems of national transportation policy. Railroads are, after all, a regulated industry. However unappealing may be the notion that a regulated industry can become bankrupt, the Trustees' efforts to rehabilitate the Debtor are circumscribed by existing statutes and regulations. To the extent that these statutes and regulations . . . preclude the exercise of self-help in achieving prof-

[7]Public Law 93-5, 87 Stat. 5 (February 9, 1973). Following that rebuke by Congress, the Trustees never again attempted to implement the work-rule changes.

itability, the legislative and executive branches of government must be looked to for solutions, if solutions are to be forthcoming.

• • •

"The legal and constitutional rights of the parties to this reorganization should be evaluated in the light of whatever changes Congress sees fit to enact.

"By the same token, however, this Court cannot ignore the realities of the Debtor's situation. On the basis of the record to date, it appears *highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.*" *Id.* at 1344-46 (emphasis added).[8]

There then followed proceedings before the ICC in August, 1973 upon proposed plans of reorganization of Penn Central filed by the New Haven Trustee and subsequently by the Penn Central Trustees and Penn Central Company. The ICC's Report dated September 28, 1973 rejected on various grounds all plans submitted for the reorganization of Penn Central,[9] and declined to certify to the Reorganization Court any plan of reorganization under §77(d), essentially adopting the position urged by the United States that reorganization of Penn Central had to await a "solution" for the Northeast that would, in turn, require Congressional action.

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[8]By the time this appeal has been heard, Penn Central will have been "permitted to operate on its present basis" for more than one year beyond the date of "highly doubtful" constitutionality.

[9]The ICC's Report dated September 28, 1973 is Doc. No. 54 in the Joint Documentary Submission. Extracts from the testimony in the ICC proceedings are set forth in Docs. Nos. 38-53 in the Joint Documentary Submission.

See *infra*, Part II-A, for a detailed discussion of the plans submitted to the ICC under §77(d) and its Report dated September 28, 1973.

On October 9, 1973, the New Haven Trustee filed a Motion to dismiss Penn Central's §77 proceedings pursuant to §77(g), alleging that the point of unconstitutional erosion of the Penn Central estate had commenced not later than January 1, 1973.[10]

On January 2, 1974, the RRRA was signed into law by the President.[11]

On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, United States Railway Association ("USRA") created pursuant to §201 of the RRRA, and Secretary of Transportation Brinegar (herein referred to collectively as the "Governmental Defendants"). The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania (*Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other Governmental Defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, under §1404(a), from the District of Columbia.

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[10]Doc. No. 13 in the Joint Documentary Submission. As is noted in greater detail in Part II-A of the Argument, this Motion and a related petition seeking an equity receivership have not been decided. No hearing was held on the §77(g) Motion until May 6, 1974. A previously filed petition of the New Haven Trustee, seeking, *inter alia*, the fixing of a date for termination of operations (Doc. No. 12 in the Joint Documentary Submission), filed on March 16, 1973, was never set down for hearing.

[11]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references to the RRRA are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional by virtue of the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his Complaint.[12] The Governmental Defendants and the Penn Central Trustees each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[13] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of

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[12]The New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E. D. Pa. C. A. No. 74-1107, Doc. No. 4; see JA 258) at pp.1-8 lists the issues included in his motion for summary judgment.

[13]As noted above, ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 3:7-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order"; JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing, or taking any action to implement, so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[14] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment to the Constitution insofar as it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82-83). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographi-

[14]This portion of the Order was entered *sua sponte* as none of the plaintiffs sought this relief.

cally throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring Opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that it was premature to judge the facial constitutionality of the compulsory conveyance provisions of the RRRA.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Article I, Section 8, Clause 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[15]

[15]RRRA, §207(b), third sentence, clause (2).

which they held to be void for lack of geographical uniformity (Concurring Opinion of Fullam, J., Part II; JA 64-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the constitutional defect of the RRRA's non-applicability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, by this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

The United States and the other Governmental Defendants, and the Penn Central Trustees as intervening defendants, each filed appeals to this Court from the Order pursuant to 28 U.S.C. §§1252 and 1253 (docketed as No. 74-167, *United States Ry. Ass'n v. Connecticut General Ins. Corp., et al.;* No. 74-168, *United States, et al. v. Connecticut General Ins. Corp., et al.* and No. 74-165, *Blanchette, et al. v. Connecticut General Ins. Corp., et al.*). The New Haven Trustee filed a cross-appeal to this Court (28 U.S.C. §1252) from so much of the Order as denied, in part, his motion for summary judgment (docketed as No. 74-166, *Smith v. United States, et al.*).

SUMMARY OF ARGUMENT

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. The RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court. This judgment, however, was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 1, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur. The RRRA was held unconstitutional in that it failed to make provision for payment to the estate of just compensation in respect of these operating deficits and consequent erosion. While the decision below is of some help in preventing an unconstitutional taking from being implemented, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues as to the constitutional defects, both facial and as applied to Penn Central, of the compulsory conveyance provisions of the RRRA are inherently important issues which require concurrent resolution.

The RRRA was enacted by Congress on January 2, 1974 to deal with the unfortunate fact that the Penn Central System[16] and certain smaller railroads in the

[16]The Penn Central System comprises railroad properties of Penn Central Transportation Company, the Principal Debtor, 15 leased lines of Penn Central which have filed for reorganization under §77 as "Secondary Debtors," and numerous other railroads controlled by Penn Central (Penn Central's Form R-1 Report for 1973 (Doc. No. 37 in Joint Doc-

(footnote continued on next page)

Northeast-Midwest region[17] are unable to generate operating revenues in excess of operating expenses, and hence are unable to achieve any net earnings before fixed charges.

The Penn Central system, for example, has incurred deficits of $851,000,000 from the date of its filing (June 21, 1970) through December 31, 1973 (Stip. Fact, ¶10) and an additional deficit of $103,579,392 during the year 1974 through June 30 (Trustees' Report dated August 5, 1974, Doc. No. 7970). Thus the total deficit of the Penn Central System during four years of operations under §77 is $954,000,000.

The basic scheme of the RRRA is to require that all reorganization courts having jurisdiction over railroads in reorganization in the Northeast/Midwest Region issue findings and orders (RRRA, §207(b)) as to whether or not such railroad shall be "reorganized" by means of conveyance, free of all existing mortgage

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(footnote continued from prior page)

umentary Submission) lists 44 transportation companies, including the 15 Secondary Debtors, which are directly controlled by Penn Central and more which are indirectly controlled). The 15 Secondary Debtors own (or lease from other railroads) 9,304 route miles of track (46.9% of the 19,853 route miles included in the System). The RRRA subjects the rail properties of all these subsidiary and leased line companies to the compulsory conveyance provisions of the Act. See §102(10): " 'rail properties' means assets or rights owned, leased or otherwise controlled by a railroad. . . ." This Section contains an exception for non-leased, controlled, but less than wholly-owned subsidiaries, which are Class I railroads, thereby excluding from the RRRA the Pittsburgh & Lake Erie Railroad, a 92.6% owned subsidiary of Penn Central.

[17]There are seven Class I railroad systems operating in the Northeast/Midwest region of the United States now in reorganization proceedings pursuant to §77 of the Bankruptcy Act: Penn Central, Reading, Central of New Jersey, Lehigh Valley and Ann Arbor (each of which has been found to be non-reorganizable on an income basis under §77); and Erie Lackawanna and Boston & Maine (each of which has been found reorganizable on an income basis under §77 and hence excluded from the RRRA). There is one Class II railroad (defined as a railroad with operating revenues of less than $5 million) in reorganization, the Lehigh & Hudson River.

liens (§303(b)(2)), of its "designated" rail properties (§206(c)) to Consolidated Rail Corporation ("Conrail"), a nominally private for-profit corporation incorporated under state law (§301(a)) which, however, is controlled by the United States Government through the device of a statutory provision (§301(d)) which mandates that 8 of the 15 directors of Conrail be government officials or persons appointed by the President with the advice and consent of the Senate. The "designation" is to be done by a final system plan prepared by USRA, a governmental agency specially created for this purpose (§201), with the assistance of the Rail Services Planning Office of the ICC (§205) pursuant to statutory goals (§206(a)), factors (§206(b)), and provisions (§§206(c), (d), (e), (f), (g), (h), and (i)). The final system plan is to be adopted within 420 days of enactment (§207(c)), and submitted to Congress for its approval, which will be deemed given if neither house passes a resolution vetoing the plan during a 60-day period (§208(a)). In the event of a Congressional veto, it is USRA's duty to prepare and submit to Congress a revised final system plan (§208(b)), although there is no time limit for it to do so. When, as and if a final system plan becomes "effective" by surviving the Congressional veto under §208(a), it is to be delivered to the Special Court, Regional Rail Reorganization Act (§209(c)), and copies filed with each reorganization court (§209(d)). Within 10 days after certification of the final system plan by USRA to the Special Court, Conrail must deposit with the Special Court the stock and other securities of Conrail and any obligations of USRA designated in the final system plan (§303(a)(1)). Within 10 days of such deposit, the Special Court must order the trustees of the railroads (whose courts entered §207(b) orders subjecting

them to the RRRA) to convey forthwith to Conrail[18] the rail properties designated in the final system plan. Only *after* the conveyances are made and are irrevocable is there any judicial review (§§303(c) and 303(d)) of the final system plan to assure that it comports with the standards of "fairness and equity" developed judicially during the era of equity receiverships and given statutory sanction by §77.

The foregoing statutory scheme of the RRRA is referred to in this Brief as the "compulsory conveyance provisions of the RRRA." This cross-appeal asserts that the compulsory conveyance provisions of the RRRA are void for repugnance to the Constitution of the United States. This was an issue which the Court below declined to reach on the grounds that the issue was "premature" and not "ripe" for decision. It is also an issue, however, which the Penn Central Reorganization Court was required to reach in its §207(b) "180-day" decision; that Court decided in favor of the New Haven Trustee's position, holding squarely that the RRRA could not be sustained either under the Bankruptcy Clause powers or the Commerce Clause (eminent domain) powers of Congress, and that the RRRA violated the Fifth Amendment rights of secured creditor and stockholder claimants to the Penn Central estate. *In re Penn Central Tranportation Co. (Memorandum in Support of Findings and Order No. 1596 Pursuant to the Second Sentence of §207(b) of the Regional Rail Reorganization Act of 1973)*, (E.D. Pa. July 2, 1974) (JA 124-51).[19] That decision has been appealed by the

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[18]Conveyances may also be directed by USRA to be made to "profitable" railroads operating in the region. A "profitable railroad" means a railroad which is not in reorganization (§102(9)), which in turn is limited to railroads subject to the RRRA (§102(12)). Thus the Erie Lackawanna and Boston & Maine, each in §77 reorganization, are "profitable railroads" as defined.

[19]Hereinafter cited as "Opinion in Support of Order No. 1596."

United States, USRA and the ICC to the Special Court (where it is docketed as No. 74-8), whose decision thereon will be known before this appeal is heard; however, by reason of the seventh sentence of §207(b), no appeal from the Special Court's decision will lie to any Court of Appeals, and hence this Court's statutory *certiorari* jurisdiction under 28 U.S.C. §1254 can not be invoked to review the Special Court's decision.[20]

In the Argument section of this Brief, the New Haven Trustee analyzes why the court below was in error in finding the constitutional issue as to compulsory conveyances under the RRRA "premature" and not "ripe" for adjudication. The basic error was the court's failure to acknowledge the features of the RRRA which will preclude effective judicial review of the same constitutional issues at a later time, namely §209(a) and the last sentence of §303(b)(2). The court below also mis-applied the prior decisions of this Court dealing with when constitutional issues can be avoided by reason of the speculative character of the alleged injury. The New Haven Trustee points out how the RRRA, if the Government Defendants are not enjoined from enforcing it, threatens to destroy the collectibility of the sum of $123,809,404 plus interest owed to him by Penn Central under this Court's decision in *New Haven Inclusion Cases*, *supra*, and thereby subject the New Haven bondholders (for whom he is a fiduciary) to further diminution in the assets of the New Haven estate available to support their claims to the equivalent of a per-parcel liquidation sale of New

[20]However, if a party aggrieved by the Special Court's §207(b) decision files a petition for *certiorari* to this Court under 28 U.S.C. §1651 alleging that the decision gives effect to an unconstitutional enactment of Congress, and that the seventh sentence of §207(b) is itself unconstitutional, this Court may have power to issue a writ "necessary or appropriate in aid of [its] jurisdiction" directly to the Special Court. 28 U.S.C. §1651. *Cf. In re 620 Church Street Bldg. Corp.*, 299 U.S. 24 (1936).

Haven's rail assets as of December 31, 1966. *New Haven Inclusion Cases, supra* at 489-90.

In Section II of the Argument, the New Haven Trustee describes the manner in which the compulsory conveyance provisions of the RRRA violate his Fifth Amendment rights. The legal and factual setting of the RRRA is described, including an historical review of the development of the law in the field of equity receiverships, §77B, Chapter X and §77 of the Bankruptcy Act, from *Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913) through the latest definitive decision of this Court, *New Haven Inclusion Cases, supra*. The factual setting includes the treatment of the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, an admittedly novel but nevertheless serious attempt by private interests to propose a settlement with the representatives of the public interest which was designed to permit private claimants to receive fair and equitable value of their claims while allowing public-interest claimants to receive securities and common stock of a "core system" made up of Penn Central rail properties comprising 11,000 route miles of mainline and principal feeder lines to be operated as a freight-only railroad divested of responsibility for passenger service. The rejection of that plan, first by the United States Departments of Transportation and Justice (whose cooperation was essential), and then by the ICC by its Report of September 28, 1973 (refusing to certify any plan for Penn Central), casts a long shadow on the Government's principal contention in support of the constitutionality of the RRRA: that Conrail's operations can be made viable through reduced trackage and divestment of responsibility for passenger train operation.

The New Haven Trustee then analyzes the compulsory conveyance provisions of the RRRA in terms of the nature and amount of securities of Conrail and obligations of USRA which can be included in a final

system plan, the limited ability of the Special Court to order additional amounts of the same types of securities provided for in the plan, and its authority to issue a deficiency judgment against Conrail, a provision aptly described below as "essentially circuitous." These features of the statute are then compared to the decisions of this Court in cases where private property is taken for a public use under authority of an act of Congress, which set forth the principle that just compensation means an amount of money or its perfect equivalent equal to the "highest and best use" value of the properties taken for public purposes. The dubious constitutionality of Conrail's acquiring the Boston–Washington corridor properties free of lien in exchange for securities, and then *selling* the corridor properties to Amtrak for $500 million as contemplated by §206(c)(1)(C) and §601(d) of the RRRA, is analyzed, and a decision of Judge Fullam, in the §207(b) proceedings of the Secondary Debtors, holding this feature of the RRRA unconstitutional, is noted (JA 153-56).

The brief then discusses the Government's principal rationale in support of the constitutionality of the compulsory conveyance provisions of the RRRA. The Government contends that if Congress and the governmental agencies can design a Conrail with some limited prospect of earnings, the capitalized value of those prospective earnings automatically fixes the value of all rail properties to be conveyed to Conrail, and that, based on *New Haven Inclusion Cases, supra*, there is no constitutional necessity for the value of the securities issued in a reorganization to be equal to the "highest and best use" value of the railroad property conveyed in exchange for such securities. The Government further contends that even if the fair capitalized value of the reasonably projected net earnings of a reorganized company would be substantially less than the liquidation value of the debtor railroad's rail properties, creditor and stockholder claimants must

nevertheless accept those securities in full satisfaction of their claims. The New Haven Trustee points out that both the opinion of this Court in *New Haven Inclusion Cases, supra,* and the opinion of the New Haven Reorganization Court, fail to support the Government's principal thesis and, in fact, squarely recognize that the claimants to a railroad estate have a right to realize value not less than the "highest and best use" value of the properties subject to their claims.

The brief then discusses the nature of Conrail as a governmentally created and controlled entity, and the distinctions which set the RRRA apart from all prior laws on the subject of bankruptcy. With specific reference to the provisions of §301(d) of the RRRA, the New Haven Trustee points out that Conrail will, for the indefinite future, be wholly controlled by the United States Government, and the owners of 100% of Conrail's common stock will have absolutely no right to control basic decisions which would affect Conrail's viability and profitability, and therefore the value of its stock. Accordingly, viewed solely as an exercise of the Bankruptcy Clause power, it is contended that the compulsory conveyance provisions of the RRRA violate substantive due process rights accorded to claimants by the Fifth Amendment.

The brief next discusses the contention that the requirement that rail properties of Penn Central be exchanged for securities of Conrail is the practical and legal equivalent of a denial of Penn Central's constitutional rights to dismissal of reorganization proceedings and termination of deficit rail operations. The brief discusses the cases which hold that a common carrier's responsibility for continued public service is not absolute but is subject to the Fifth Amendment right to withdraw the carrier's property from service once it has become clear that there is no reasonable expectation of its earning a reasonable return on its investment.

The New Haven Trustee then analyzes the manner in which public interest goals of the RRRA could be implemented by an amendment to the statute which would cure its constitutional defects. It is suggested that the basic defects of the Act could be cured by having USRA initially subscribe to the capital stock of Conrail and thereby assume the burden of entrepreneurial risk with respect to the proposition that Conrail's operations can be so structured as to make Conrail a profitable carrier.

In Section III, the New Haven Trustee turns to a discussion of how the procedures of the RRRA offend procedural due process by mandating conveyance of rail assets prior to judicial review of the adequacy of the consideration, particularly when there is no possibility that a court may subsequently set aside the conveyances upon a finding that just compensation has not been paid.

Section IV of the Argument discusses the contention that the compulsory conveyance provisions of the RRRA, as an amendment of §77 of the Bankruptcy Act, constitute legislation "on the subject of bankruptcy" which is void on grounds of lack of geographical uniformity required by Article I, Section 8, Clause 4 of the Constitution. It is asserted that the court below was correct in holding that claimants to the Penn Central estate have standing to challenge the RRRA on grounds of lack of geographical uniformity, but erred in limiting the impact of its holding to a single provision of the RRRA requiring mandatory dismissal of §77 proceedings upon a finding that the Act's processes are not "fair and equitable." The court's conclusion that the RRRA adds nothing to the powers of reorganization courts under §77 to impair the obligations of contracts of secured creditors of a railroad is asserted to be in error based on a comparison of the operative provisions of the RRRA and their asserted counterparts found in §77.

ARGUMENT

I

THE COURT BELOW ERRED IN NOT DECIDING WHETHER THE COMPULSORY CONVEYANCES MANDATED BY THE RRRA VIOLATE THE FIFTH AMENDMENT RIGHTS OF THE NEW HAVEN TRUSTEE

In his summary judgment motion, the New Haven Trustee sought a permanent injunction against the enforcement of so much of the RRRA as would constitute an unconstitutional taking of Penn Central's rail properties and his mortgage and other lien interests therein.[21] This issue was characterized by the New Haven Trustee in his Memorandum of Points and Authorities in Support of Motion for Summary Judgment (filed May 2, 1974, E.D. Pa. C.A. No. 74-1107, doc. no. 4; see JA 258) as follows:

> "Legal Issue No. 1. Various sections of the 1973 Act [i.e., the RRRA] hereinafter enumerated constitute a taking by force of law for a public use of the property of Penn Central, a railroad in reorganization owning rail properties within the

[21] As is noted in his Jurisdictional Statement, the New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1, 2) and also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3), to secure the total unpaid portion ($123,809,404, as of December 31, 1973, plus interest) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra*. In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

meaning of the 1973 Act, and operating under lease rail properties of railroads 'leased, operated or controlled' by Penn Central within the meaning of the 1973 Act

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"(b) upon the date when certain rail properties of Penn Central and the several Lessors (the 'Designated Properties') will be ordered under the 1973 Act to be conveyed pursuant to §303(b) of the Act to Conrail and other transferees referred to in §§206(c), 206(d) and 303(b) of the 1973 Act, as a law providing for a taking for a public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of said Designated Properties; and (ii) of the right, title and interest of Plaintiff as owner of Bonds secured by the Divisional Mortgage, which lien will be divested by operation of §303(b) of the 1973 Act insofar as it attaches to Designated Properties." (*Id.* at 4).

A majority of the Court below (Judges Aldisert and Bechtle) never reached the merits of this contention because of the belief, which it is submitted was erroneous, that this issue was "premature." It is of course true that:

> "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring).

But that assumes that the issues so deferred can later be reviewed. The New Haven Trustee asserts by this cross-appeal that there may not be a later time at which a court can *effectively* protect the New Haven Trustee against the threatened unconstitutional taking of his property. If a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist, then the constitutional issue presented here must fall in the "have to" review area where courts should be available to pass on claims of

constitutional right to judicial process, and to provide such process if the claim is sustained.

Judges Aldisert and Bechtle failed to give appropriate significance to the provisions of the RRRA whereby, with the exception of a pre-final system plan civil action attacking the RRRA as violative of the Constitution, under 28 U.S.C. §§1331, 2282 and 2284, Congress has created in the RRRA an exclusive self-contained system of judicial review even more preclusionary than that contained in the Emergency Price Control Act of 1942, which this Court sustained in *Lockerty v. Phillips*, 319 U.S. 182 (1943) and *Yakus v. United States*, 321 U.S. 414 (1944).[22]

Under the second sentence of §207(b) of the RRRA, a decision by the Special Court that Penn Central must reorganize by conveying its rail properties to Conrail has the following effects which preclude later judicial review:

(a) It is a final, non-appealable order, which is purportedly not reviewable in this Court (§207(b), last sentence);

(b) It has an arguable *res judicata* effect on any subsequent contentions that the compulsory conveyance provisions of the RRRA (§§206(c), 206(d), 207(c), 208, 209(c) and (d), and 303(b)) are unconstitutional, since the §207(b) judgment would necessarily have been that the "process" of the RRRA is "fair and equitable" (§207(b), third sentence);

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[22]In *Yakus*, Mr. Justice Rutledge interpreted §204(d) of the 1942 legislation not to preclude a challenge to the constitutionality of price regulations in the Emergency Court of Appeals, and on review by *certiorari*, in the Supreme Court. §207(b), last sentence, purports to exclude this Court from reviewing the Special Court's §207(b) decision by withdrawing the jurisdiction of the Courts of Appeal, whose judgments are reviewable by writ of *certiorari* under 28 U.S.C. §1254. But see 28 U.S.C. §1651 and *In re 620 Church Street Bldg. Corp., supra.*

(c) The implementation of the §207(b) finding by USRA certifying to Congress and then to the Special Court the final system plan would be governed by §209(a) of the RRRA which provides that:

> "Notwithstanding any other provision of law, the final system plan . . . *is not subject to review by any court* except in accordance with this section." (Emphasis added).

(d) The implementation of the §207(b) finding by USRA certifying to the Special Court the final system plan and the Special Court's ordering the conveyances therein set forth would be governed by §303(b)(2), last sentence, of the RRRA, which provides that:

> "Such conveyances [i.e., the conveyances pursuant to §303(b)(1) which Judge Aldisert's opinion assumes could be enjoined in a subsequent civil action under 28 U.S.C. §1331 on constitutional grounds] *shall not be restrained or enjoined by any court.*" (Emphasis added).[23]

Judges Aldisert and Bechtle erred in their approach to the prematurity issue because they failed to observe the consequences of a §207(b) decision in the light of the prohibitions against subsequent judicial action provided in §§209(a) and 303(b)(1).

The foregoing is consistent with Judge Fullam's concurring opinion below[24]:

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[23]Judge Aldisert's opinion below does not treat with the problem created by §209(a) and §303(b)(2).

[24]Although Judge Fullam clearly concurred in the judgment, he parted company with Judge Aldisert on the "prematurity" issue, and his opinion should be read as a dissent as to that issue, particularly since the order in which he concurred enjoins USRA from certifying a final system plan to the Special Court under §209(c) of the RRRA.

". . . the majority fails to reach a number of issues which I feel must be faced, not only because they are indeed ripe for decision, but because the principal conclusion expressed by the majority—that the Regional Rail Reorganization Act of 1973 is unconstitutional because it fails to provide compensation for interim erosion during the planning period—necessarily depends upon an evaluation of the nature and validity of the Act's provisions concerning mandatory conveyance of rail properties to Conrail. In short, I believe the majority has attempted to isolate an issue which cannot be isolated.

* * *

"In considering which issues must be faced at this time, it is important to keep in mind the distinctions between concepts of standing, ripeness, and the need for injunctive relief.

"Unquestionably, one or more of the parties to these law-suits have standing to raise every issue which has been presented. That is, the statute affects these parties in particular, as distinguished from the public at large, in substantial ways. They thus meet the tests of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Flast v. Cohen*, 392 U.S. 83 (1968).

"The question of whether all of the constitutional issues are ripe for decision requires us to analyze the inevitability of the alleged unconstitutional impact, whereas the immediacy of the alleged threat bears upon the propriety of injunctive relief.

"By July 1, 1974, each of the reorganization courts will have made, or failed to make, findings pursuant to §207(b) of the Act. Under the statute, the effect of these findings or non-findings (as affirmed or reversed by the Special Court within 80 days thereafter) will be either that the statutory processes will inexorably apply to these estates, or

that the §77 proceedings will be dismissed. The plaintiffs assert that the §*207(b) proceedings themselves are unconstitutional on due process grounds. Surely this challenge is now ripe for decision; indeed, the defendants do not contend otherwise.*"

"Plaintiffs challenge the *entire Act* as a violation of the *uniformity requirement* of the bankruptcy clause, Article I, Section 8, Clause 4 of the Constitution. *Again, this issue is undeniably ripe for decision.*

"Finally, plaintiffs pose a series of challenges to the statutory provisions which contemplate the mandatory transfers of rail assets to Conrail or to existing solvent carriers, at prices to be determined by the Special Court after the event, and to be paid in the form of a to-be-determined mixture of Conrail securities, undefined 'other benefits', and possibly a limited amount of guaranteed obligations of USRA. Whether some or all of these 'ultimate conveyance' issues are now ripe for decision is a more difficult question.

* * *

"No one doubts, and in fact the parties have stipulated, that Penn Central rail properties will be included in the Final System Plan. Equally certain is the fact that USRA will deliver to Congress a Final System Plan which is to become effective 60 session-days thereafter. In order to prevent the Plan from taking effect, one House of Congress must act affirmatively by passage of a resolution expressing disapproval of the Plan, §208(a). Section 208(b) makes it the continuing duty of USRA to present final system plans to the Congress until one becomes effective. I cannot equate Congress' reservation of the right to veto the first Final System Plan, or even the second or third, to a situation in which Congressional action is necessary as a precondition to a Final System Plan becoming effective. I believe this Court must assume that the Act means what it says, and that the expressed intent of Congress would be carried out.

"Once a Final System Plan is effective, *i.e.*, when the 60-day Congressional action period expires, the Special Court is required under §303(b) to order conveyance of the property, *there remains no discretionary role to be played by the Special Court, or any other court, at that point.* Therefore, it is clear that if the reorganization court *does not make §207(b) findings that remove the railroad from the RRRA, conveyances are certain,* save only amendment or repeal of the RRRA. Of course, the possibility of future legislative and executive action is always present during the judicial evaluation of the constitutionality of a statute, and does not render such adjudication premature.

"The last potential exit would be a finding by the reorganization court that the RRRA 'does not provide a process which would be fair and equitable to the estate of the railroad in reorganization,' §207(b). In my view, this possibility does not raise an issue of ripeness, but rather, a question more akin to abstention.

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". . . it is highly improbable that a reorganization court could successfully reject the statute as unfair or inequitable under §207(b) for reasons of less than constitutional magnitude. Indeed, the government's position at the June 10 hearing in the reorganization court was that nothing short of unconstitutionality would justify rejection of the Act under §207(b). Thus, the issue is essentially whether it is preferable for the three-judge court to rule on the constitutional issues surrounding the conveyance provisions, either directly or in conjunction with plaintiffs' due process attack on §207(b), before the reorganization courts act under §207(b).

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. Enforcement of major federal legislation is sought to be enjoined. As a prac-

tical matter, a decision by the reorganization court under §207(b) that a constitutional infirmity requires the Act to be found not fair and equitable would be equivalent, for all practical purposes, to an injunction that might issue as a result of this three-judge court litigation; and a contrary decision would be equivalent to denial of an injunction.

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". . . I am satisfied that, in the final analysis, many of the constitutional issues concerning the mandatory conveyance features of the Act are necessarily ripe for decision at this time because of their relationship to the issues of interim erosion. While it is not necessary to determine whether or not the contemplated transfers would amount to takings in the constitutional sense, requiring advance assurance of payment in cash or equivalent, I am persuaded that the constitutional validity of uncompensated interim erosion cannot be properly decided except in the light of the constitutionality of the ultimate result which implementation of the Act would produce." (JA 55-60; emphasis added).

Judge Fullam has thus, it is submitted, correctly shown why it is not premature now to judge the constitutionality of the compulsory conveyance provisions of the RRRA, or to reach the issues as to denial of procedural due process by §207(b) and related provisions of the RRRA. The cases cited in Judge Aldisert's opinion on the prematurity issue are, on the other hand, inapposite for a number of reasons relating to the structure of the RRRA's provisions relative to judicial process.

Judge Aldisert treated the claim that the compulsory conveyance provisions of the RRRA will, if not enjoined, constitute an inadequately compensated taking of plaintiff's property as being analogous to cases

seeking an injunction to restrain threatened enforcement of criminal statutes, invoking the following cases: *Poe v. Ullman*, 367 U.S. 497 (1961); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); and *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961). In each of the foregoing cases the plaintiffs attempted, by pre-enforcement suits challenging the constitutionality of the relevant statute, to restrain the enforcement of the statute as applied to them. In each instance, the Court was compelled to gauge the immediacy of the threat of enforcement and held that none of the fact situations evidenced the clear, present threat of injury necessary to sustain a justiciable controversy.

In *Poe v. Ullman, supra*, for example, plaintiffs were two married persons, and their doctor, who sought a declaratory judgment as to the unconstitutionality of a Connecticut statute prohibiting the use of contraceptive devices or the giving of medical advice about them. The Connecticut courts upheld the statute, even as applied to married couples. After plenary consideration in this Court, the appeal was dismissed, with the Justices voting 5-4 and without an opinion of the Court. Justice Frankfurter (joined by Chief Justice Warren and Justices Clark and Whittaker) thought the case fell within the rules of judicial self-restraint summarized in Mr. Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936). Justice Brennan concurred in the result on the practical ground that:

> "The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide

the constitutional questions urged upon us when, if ever, that real controversy flares up again." 367 U.S. at 509.

Cases such as *Poe v. Ullman* must, however, be compared with the cases such as *Epperson v. Arkansas*, 393 U.S. 97 (1968), where plaintiffs sought an injunction and declaratory judgment that a 1928 law prohibiting the teaching of evolution was unconstitutional. The Court disposed of any "justiciability" problems as follows:

> "There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in [Arkansas, Mississippi and Tennessee]. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented." *Id.* at 101-02.

In *Roe v. Wade*, 410 U.S. 113 (1973), plaintiff "Jane Roe" was an unmarried woman who was pregnant at the inception of litigation and who

> "sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes." *Id.* at 120.

This Court found the case of "Jane Roe" presented a justiciable controversy ripe for determination, but that the case of "John and Mary Doe," a married, childless couple, was of a

> ". . . speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may or may not take place, and all may not combine. . . .But we are not prepared

> to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. [Citations omitted] The Does' claim falls far short of those resolved otherwise in the cases the Does urge upon us, namely *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Data Processing Service v. Camp*, 397 U.S. 150 (1970); and *Epperson v. Arkansas*, 393 U.S. 97 (1968)." *Id.* at 128.

In the instant case, the New Haven Trustee's standing and the immediacy of the threatened harm clearly favor justiciability of his claim that the RRRA is unconstitutional under the reasoning of *Epperson v. Arkansas* and *Roe v. Wade*, which cases are not cited in Judge Aldisert's opinion.[25] See also *Steffel v. Thompson*, 42 U.S.L.W. 4357 (U.S., March 19, 1974).

The New Haven Trustee is owed $123,809,404, plus interest, by Penn Central; the entire debt is secured by a claimed (but unadjudicated) equitable lien deriving from this Court's remand, in *New Haven Inclusion Cases, supra*, and $34,025,800 is secured by a first mortgage on the former rail properties comprising the largest portion of the assets conveyed by New Haven to Penn Central on December 31, 1968.[26] The defendant USRA, if not enjoined, presently intends, and thus can be expected, to prepare a final system plan under §206 designating a significant portion, if not all, of these same rail properties for conveyance

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[25] Judge Fullam, dissenting as to prematurity, cited two of the recent cases on the related issues of standing and justiciability, namely *Data Processing Service v. Camp, supra*, and *Flast v. Cohen, supra*.

[26] The United States and the other governmental defendants have conceded for the purpose of this litigation that "It is likely that some of the rail properties of Penn Central subject to the Divisional Mortgage and the indeterminate lien . . . will be designated pursuant to each subsection of §206(c)(1) [of the RRRA] for transfer, sale or conveyance pursuant to §206(d) of the Act in any final system plan made effective under the Act." Stip. Fact ¶4.

to Conrail; Congress intends, and thus can be expected, to approve a final system plan prepared by USRA under §208; the plan so approved is intended, and thus can be expected, to be certified by defendant USRA to the Special Court, under §209(c); Conrail can be expected to deposit the securities provided for in the plan under §303(a); the Special Court can be expected within 10 days of the §303(a) deposit to obey the directive contained in §303(b)(1) to order the Penn Central Trustees to convey forthwith the properties designated in the plan to Conrail; and the Penn Central Trustees can be expected to comply with the Special Court's order. Therefore, if these provisions of the RRRA are not enjoined, the New Haven Trustee's lien, securing $123,809,404, plus interest, can be expected to be divested as provided in §303(b)(2). Obviously, once his lien is divested, the New Haven Trustee is faced with the clear and present danger that in a subsequent §77 plan Penn Central would not have assets sufficient to pay the New Haven Trustee's claim, which will rank junior to administration expenses and Trustees' Certificates which now aggregate close to $1 billion.

In weighing ripeness considerations, the court below should have been guided by this Court's pronouncement in *Railroad Transfer Service, Inc. v. Chicago*,[27] 386 U.S. 351, 357 (1967), that

> "It is difficult to imagine a controversy more actual, alive, and ripe than this one. It has lasted for more than a decade."

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[27]The case involved a Chicago ordinance which purported to require a local inter-terminal carrier to demonstrate annually to the City of Chicago its ability to satisfy the public convenience and necessity, before the City would grant it a license to do business. The issue was whether this ordinance placed an undue burden on interstate commerce and infringed upon an area preempted by the Interstate Commerce Act. The Court reached the merits of this issue over the City's objections that the issue was premature.

With all due respect, *Smith v. United States* may well pose the one case which is even more ripe than *Railroad Transfer Service*, since the New Haven Bondholders, who initially had mortgage liens on certain of the rail properties involved in this case, have had their right to foreclose, and to realize payment of their claim, postponed since 1961. The end of the litigation to assure the New Haven Bondholders payment on their claims, if not hastened by this Court, may well be deferred into the 1980's. Surely, the ultimate impact on the New Haven estate of a §303(b) conveyance order is sufficiently likely and clearly foreseeable that its constitutionality should be adjudicated now. See *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, 341 U.S. at 156.

II

THE COMPULSORY CONVEYANCE PROVISIONS OF THE RRRA VIOLATE THE NEW HAVEN TRUSTEE'S FIFTH AMENDMENT RIGHTS

A. Legal and Factual Setting of the RRRA

As was noted in Judge Fullam's concurring opinion below, in approaching the question of the constitutionality of the compulsory conveyance provisions of the RRRA, it is necessary first to review the "legal theories underlying the reorganization provisions of the Bankruptcy Act, and their application to the Penn Central proceedings apart from, and in relation to, the RRRA itself."[28]

The early cases of corporate reorganization under equity receiverships involved a decision by senior creditor and equity groups that their respective financial interests would be better served by having a new company with scaled-down capitalization assume the business of the financially embarrassed debtor and thereby maintain the values of a going business. The devices chosen evolved out of the procedures of equity: instead of separate bills of foreclosure by each secured creditor group, the court was asked to enter what amounted to a consent decree of foreclosure under which a newly formed company purchased the assets of the debtor in exchange for the securities comprising a portion of the new capital structure. Since the consent of the stockholders of the debtor was considered essential to a consent decree, in an equity receivership plan the new company might exchange a portion of its capital stock for the entire capital stock of the old com-

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[28]Concurring Opinion of Fullam, J. (JA 65); Judge Fullam's analysis is directed primarily to the constitutional limits upon imposing further uncompensated rail deficits on the estate of a railroad in reorganization.

pany.[29] Decisions of this Court, cited in the note, held that these arrangements were subject to judicial scrutiny at the insistance of any non-consenting creditor who claimed that he should be entitled to full recognition in the plan if junior creditors or stockholders were to be allowed to participate at all.

The amendments of the Bankruptcy Act dealing with corporate reorganizations (§77B and Chapter X) and railroad reorganizations (§77, enacted in 1933 and amended in 1935) enacted in the 1930's must be read in the light of practices developed in the field of equity receiverships. Terms such as "fair and equitable" and "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" appearing in §77(e) of the Bankruptcy Act were phrases of art which re-

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[29]See, *e.g., Northern Pacific Ry. v. Boyd*, 228 U.S. 482 (1913), and earlier cases therein cited. The device of the consent decree was held not to foreclose a non-consenting creditor of the old company whose claim was reduced to judgment many years later from claiming, even in the absence of fraud, that he was entitled to have his claim paid since valuable consideration was paid to stockholders of the old company. See also *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), in which a consent arrangement involving participation by stockholders of the old company was denied judicial approval under §77B of the Bankruptcy Act. This case was followed by *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941), also under §77B, in which the "absolute rule of priority" doctrine was held not satisfied in the absence of detailed valuation findings as to the capitalized value of the entire enterprise and the ability of the reorganized company to meet the interest and dividend requirements of the new securities. The consent arrangements in the equity receivership and §77B cases involved intricate packages of corporate securities such as fixed-income bonds, contingent interest bonds, participating preferred stock and common stock, with voting power allocated in different ways depending on such matters as whether contingent interest was earned or preferred stock dividends paid. Such reorganizations were "income-based" reorganizations in the sense that the debtor was a going concern with a record of sufficient income before fixed charges to support a modified capital structure although not its existing structure.

flected the accumulated judicial experience of dealing with equity receiverships.[30]

Section 77, the Bankruptcy Act provision which has governed railroad reorganization from 1933 until the enactment of the RRRA, while departing in many respects from equity receivership and §77B reorganizations, nevertheless involved judicial scrutiny as to whether the standards of the *Boyd*, *Case* and *Consolidated Rock* decisions, *supra* note 29, were met. Section 77(e) required that before a plan of reorganization could be carried out the judge must find that the plan, certified to the court under §77(d) by the ICC, was "fair and equitable." Under §77, the ICC and the court could determine that the stockholders of the railroad, or any class of creditors, had no equity and could properly be awarded nothing in the plan. See *Ecker v. Western Pacific R.R. Corp.*, 318 U.S. 448 (1943); *Group of Institutional Investors v. Chicago, M., St. P. & P. R.R.*, 318 U.S. 523 (1943). The 1935 amendments to §77 included a "cram-down" exception to the voting requirement that the plan be approved by at least two-thirds in interest of each class entitled to participate in the plan. The cram-down exception, which essentially completed a statutory scheme which has remained intact until the RRRA, permitted the judge to override the objections of a dissenting class of creditors provided he determined that the plan provided fair and equitable treatment for the interests of those rejecting it and found that "such rejection is not reasonably justified." See *Reconstruction Finance Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495 (1946).

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[30] "The words 'fair and equitable' . . . are words of art which prior to the advent of §77B [the predecessor of Chapter X] had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations." *Case v. Los Angeles Lumber Products Co., supra*, 308 U.S. at 115.

Until the reorganization proceeding of the New Haven Railroad which commenced in 1961, prior railroad reorganization cases under equity receiverships and §77 had generally involved debtor corporations which were viable businesses but were financially embarrassed in the sense that their operations could not support their existing capital structures. As Judge Fullam noted in his concurring opinion,

> "Both §77(e) and the Supreme Court's pronouncements in *Consolidated Rock Products, Ecker* and *Institutional Investors* cases require that earning power or income-generating capacity of the debtor be the measure of a railroad's value." (JA 68)

Except for the happenstance of the Penn Central merger, hereinafter discussed, the New Haven's reorganization might well have gone the way of the New York, Ontario & Western Railroad, which ended in a liquidating equity receivership,[31] since the ICC and the Court each found that the New Haven had no possibility of achieving profitable status, or even net income before fixed charges:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." *In re New York, N.H. & H. R.R.*, 289 F. Supp. 451, 455 (D. Conn. 1968).

In the case of the New Haven's §77 proceedings, a totally fortuitous event emerged to make possible a reorganization plan under §77, rather than dismissal of reorganization proceedings and a liquidating equity receivership: two major, profitable trunk-line carriers,

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[31]See *New York, Ontario & Western Reorganization*, 295 I.C.C. 346 (1956), in which the railroad was declared unreorganizable by the ICC, leading to a dismissal and liquidation of the enterprise. See also *In re New York, Ontario & Western Ry.*, 171 F. Supp. 634, 635, 647 (S.D.N.Y. 1958).

one operating in the New Haven's territory, the New York Central Railroad, and the other a connecting carrier with the New Haven, the Pennsylvania Railroad, petitioned the ICC for authority to merge, thereby opening up the possibility of an inclusion petition by the New Haven Trustee pursuant to §5(2)(d) of the Interstate Commerce Act. What then followed is known to this Court and need not bear repetition. See *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*[32]

In relation to an assessment of the RRRA, the most important aspect of the New Haven experience is that the Trustees of the New Haven perceived that the merger of the Pennsylvania and New York Central Railroads offered the possibility of a solution which recognized both the compelling public interest in maintaining rail transportation in Southern New England and the satisfaction, through securities of a (then perceived to be) profitable trunk line railroad system, of the private interest in realizing the equitable equivalent of the highest and best use value of the New Haven's rail properties. There was thus a *voluntary* decision and recommendation by the Trustees of the New Haven to pursue inclusion in the proposed merged Penn Central, and to seek to sell the New Haven's rail assets to the merged Penn Central, subject to administrative and judicial determinations as

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[32]One aspect of the New Haven situation which does deserve repetition is the fact that the rights of the New Haven bondholders have now been held in suspension under §77 since July, 1961, and no immediate relief is in sight. As Judge Fullam commented in his opinion below:

> "I find it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not permit a constitutionally permissible result, the parties may then start over again in the Court of Claims. The rights of the secured creditors of the New Haven, for example, have already been held in suspension for more than ten years." (JA 81).

to the equivalence of value of the assets and the consideration (in the context of a §77 plan of reorganization), as being in the financial self-interest of the claimants to the New Haven estate, as well as in the public interest. The New Haven Bondholders' representatives initially acquiesced in the concept of inclusion, although reserving their rights with respect to the adequacy of the consideration. The Bondholders originally opposed consummation of inclusion prior to a final decision as to the consideration (leading to the "Procrustean measures" language by Mr. Justice Fortas in *Penn Central Merger Cases*, 389 U.S. at 510-11), but later consented to the conveyance of New Haven's assets and divestment of their liens on the basis of assurance of subsequent judicial review as to the adequacy of the consideration. Thus, *New Haven Inclusion Cases* arose in a procedural context totally at variance with the factual setting of the present case.

In the case of Penn Central's reorganization, there was no possibility of a solution involving voluntary acquisition of the rail assets by another carrier or carriers, since no carrier could afford to assume Penn Central's deficits in net railway operating income amounting to some $90 million annually. This, however, did not prevent the private parties in interest from attempting to seek a solution. Particularly significant in the present context was an attempt by the New Haven Trustee to achieve an accommodation between the interests of the public sector in continued rail transportation and the interests of the private creditors and stockholders of Penn Central in receiving value equal to their respective equities in an estate whose overall liquidation value is indicated to be upwards of $4 billion. The New Haven Trustee's Plan for Reorganization of Penn Central, filed with the ICC on June 28, 1973, called for expedited action by the ICC under §1(18) of the Interstate Commerce Act to adopt

a "core system" of 11,000 miles, and to approve and certify pursuant to §77(d) a plan under which the rail properties of Penn Central required for the 11,000-mile system would be transferred to a new corporation, "Core Railroad;" the Boston-Washington passenger corridor would be operated on the basis of a governmental subsidy providing for a return on investment by a new corporation, "Northeast Railroad," which would lease trackage rights for which it would pay Core Railroad a fair rental based on the value of the property fairly allocable to passenger operations; non-rail and surplus rail assets would be segregated; and an investment company called Penn Central Enterprises (all of the securities of which would be issued to private creditor and stockholder claimants of Penn Central, in the order of the priority of their claims) would be created to hold all of the non-rail assets of Penn Central, plus all of the stock of Northeast Railroad, a portion of the stock of the Core Railroad and all the stock of a liquidating subsidiary to which non-essential rail properties would be conveyed. The New Haven Trustee's Plan required the United States and other public interest claimants, including labor claimants, to accept senior debt securities, junior securities and common stock of Core Railroad in exchange for all of their claims. The Plan was not approved by the ICC, which held hearings in August 1973 on the New Haven Trustee's Plan and two other proposed plans for reorganization submitted to it pursuant to §77(d).[33] The United States Departments of

[33]The other plans included a plan filed by the Penn Central Trustees which called for cessation of operation and sale of all rail properties to others, hopefully to public authorities and other railroads interested in operating the properties; and a plan filed by Penn Central Company which contemplated an action against the United States in the Court of Claims under 28 U.S.C. §1491 ("Tucker Act"). The ICC held that the Trustees' proposed plan was not a "plan" within the meaning of §77(d). The ICC rejected the plan filed by Penn Central Company.

Transportation and Justice opposed the New Haven Trustee's Plan. In a report dated September 28, 1973, the ICC rejected the New Haven Trustee's Plan on a number of grounds, but principally that the Core Railroad would not be economically viable.[34]

The efforts represented by the New Haven Trustee's Plan, the opposition to it of the government and its rejection by the ICC, are significant to the decision here. The refusal of the ICC, after objection by the government, to approve a plan calling for an 11,000 mile streamlined "core" freight-only railroad, made up of principal main line and high density feeder routes, as proposed by the New Haven Trustee, must fairly be deemed to cast a long shadow on the underlying theory of the RRRA, which is based on the assumption that Conrail, a freight-only railroad[35] made up of the essential or "core" lines of Penn Central and a few other relatively small bankrupt carriers, could be designed so as to be economically viable.

In any event, the New Haven Trustee treated the ICC's rejection of his Plan as dispositive of any private attempt to arrange an accommodation with the public sector. The Plan provided that, if it were not promptly accepted by the ICC, the United States, organized labor and the States (in respect of tax claims), whose voluntary consent thereto was a necessary precondition, the New Haven Trustee would move promptly under §77(g) for dismissal of the §77 proceedings, and, under §77(i), for an equity receivership calling for the

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[34]As noted above, the ICC's September 28, 1973 Report is Doc. No. 54 in the Joint Documentary Submission. The New Haven Trustee's Plan is described at pp. 27-36; the ICC's conclusions are set forth at pp. 59-77 and in App. DD.

[35]The RRRA contemplates that Conrail will sell or lease the Washington-Boston passenger corridor to National Railroad Passenger Corporation (Amtrak). See §§206(c) (1) (C) and 601 (d) of the RRRA.

prompt liquidation of Penn Central's rail properties.[36] The New Haven Trustee accordingly on October 9, 1973 filed his §77(g) Motion to dismiss Penn Central's §77 proceedings.[37]

Congress was aware of the pendency of the §77(g) motion while it was considering the RRRA, as evidenced by the legislative history.[38] Apparently with the intention of mooting the §77(g) motion, Congress then amended pending bills so as to expand the definition of "railroad in reorganization" (RRRA, §102(12)) to include railroads in equity receiverships.[39] Congress also

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[36]A liquidation equity receivership would not, of course, be inconsistent with a series of sales of rail properties for continued railroad use (at the "highest and best use value") to public authorities (federal and state) and other railroads (such as the major trunk line carriers in the West and South, as well as the Northeast, which carry substantial Penn Central originated and terminated traffic).

[37]Doc. No. 13 in the Joint Documentary Submission. The Penn Central Reorganization Court at first did not hold any hearing on the §77(g) Motion on the ground that it was waiting for a legislative solution. See *In re Penn Central Transportation Company (Columbus Option Appeals)*, 494 F. 2d 270 (3d Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3633 (May 8, 1974). On May 6, 1974, a hearing was held on the §77(g) Motion, but no decision has been forthcoming. Judge Fullam has stated that he deliberately deferred action on the §77(g) Motion of the New Haven Trustee: "By a series of actions and inactions which need not be detailed here, this Court held all such proposals in abeyance pending action by Congress on the RRRA." *Opinion in Support of Order No. 1596, supra* (JA 131). On August 8, 1974, by Order No. 1648, Judge Fullam ordered the Penn Central Trustees to file a report on September 3, 1974, and called a hearing on September 17, 1974, with respect to the desirability of sequestration of non-rail income for the purpose of paying taxes and other administration expenses now being deferred, and again specifically deferred any adjudication of the §77(g) Motion pending said hearing.

[38]See, *e.g.*, 119 Cong. Rec. H. 9767 (daily ed. Nov. 8, 1973; remarks of Rep. Shoup, co-sponsor of the Shoup-Adams bill which eventually became the House version of the RRRA); 119 Cong. Rec. H. 9731 (daily ed. Nov. 8, 1973; remarks of Rep. Adams relative to the Shoup-Adams bill).

[39]Compare §103(11) in "Working Paper No. 1, Rail Services Act of 1973," dated Nov. 11, 1973: "(11) 'Railroad in reorganization' means a railroad which is a debtor in a reorganization proceeding under section 77 of the Bankruptcy Act (11 U.S.C. 205)," with §103(12) in S. 2767, reported to the Senate on Dec. 3, 1973, in which the following sentence first appears: "A 'bankruptcy proceeding' includes a proceeding pursuant to section 77 of the Bankruptcy Act (11 U.S.C. 205) or an equity receivership or equivalent proceeding."

designed §207(b) in such a way that one of the possible factual foundations for the granting of the §77(g) Motion, that an income-based reorganization was not possible, would itself trigger compulsory conveyances (RRRA, §207(b), first sentence) rather than a dismissal of the proceedings under §77(g).

Subsequently, the Institutional Investors Penn Central Group and substantially all indenture trustees of Penn Central System bonds petitioned for a prompt termination of rail operations. This petition was premised on a view that termination of rail operations and sale of rail properties could be achieved even if §77 proceedings continued. A petition was also filed by Penn Central Company, the holding company owning all of Penn Central's stock, for a segregation of non-rail properties from rail properties and cessation of rail operations.[40] These petitions, together with the New Haven Trustee's §77(g) Motion, establish the unanimity of substantially all creditor and stockholder parties in the position that deficit rail operations of Penn Central are constitutionally required to terminate.

The relationship between the RRRA and the pending motions to dismiss Penn Central's §77 proceedings and terminate rail operations is clearly stated by Judge Fullam in his opinion below:

> "Another aspect of the RRRA's impact that warrants consideration, is the relationship of the availability of the RRRA's processes to the pending petitions to terminate rail services and to dismiss Penn Central's §77 proceeding. *Obviously, the RRRA is an important factor to be weighed by the reorganization court in assessing [the] validity of the petitioners' contentions*

[40]The petitions to terminate rail operations were heard by the Reorganization Court on May 6, 1974, together with the hearing on the New Haven Trustee's §77(g) Motion, and remain undecided. As noted above, a hearing has been scheduled for September 17, 1974 with respect to the desirability of sequestering non-rail income for the purpose of paying administrative expenses, and Order No. 1648 calling such hearing has specifically deferred adjudication of these petitions and the §77(g) Motion.

that operations can no longer be constitutionally required." (JA 59-60; emphasis added).

Given the history of Penn Central's hopelessly unprofitable rail operations and chronic cash crises resulting from deficit operations,[41] and the utter futility of the private efforts to reorganize Penn Central in the face of opposition of the government and the ICC, it became obvious that if any solution contemplating ongoing operation of the Penn Central System were to be forthcoming, it would have to be a solution created by Congress.

The congressional solution has been aptly described by Judge Fullam as follows:

> "To summarize, the RRRA represents an amalgam of sale, reorganization, and eminent domain concepts. Implementation of the Final System Plan would produce transactions akin to sales under §77(o) or §77(b) (5) of the Bankruptcy Act, *but without the safeguards of participation by the parties or advance judicial scrutiny;* sales in which the price would be paid in a form somewhat like that encountered in a plan of reorganization. The transactions would somewhat resemble a reorganization in which the 'cram down' decision is made by Congress, or at least virtually compelled by Congress, *in advance of formulation of the plan.* And the plain purpose of the entire arrangement would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, *without regard to the wishes of the present owners of the*

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[41] As is indicated by Stip. Fact ¶11, in order to continue its operations, it was necessary for Penn Central not only to defer all real estate taxes, leased line rentals and interest payments, but also to utilize extraordinary sources of cash to the extent of $157 million. This amount is exclusive of $28.8 million made available in 1974 to Penn Central by the United States Department of Transportation under §213 of the RRRA; of this amount, $10.8 million was made available in the form of a purchase by the United States of a participation in certain equipment obligations of Penn Central. See Order No. 1480 and Memorandum in Support thereof (Docs. Nos. 29 and 30 in the Joint Documentary Submission). Appeals from Order No. 1480 are pending in the Third Circuit.

properties." (Fullam, J., concurring; JA 77-78; emphasis added).

In the RRRA, Congress set forth what it was willing to do, by way of amending §77 and authorizing and committing monies of the United States[42] by way of a solution, and equally importantly, what it was *not* willing to do. Specifically, Congress indicated that it was *not* willing (except possibly to the extent of $500 million of government-guaranteed bonds of USRA) to permit the estates of Penn Central and other bankrupt carriers subject to the RRRA to be paid the "highest and best use" value of the designated rail properties in any form save that of common stock and possibly more senior securities of Conrail. While the RRRA employs words of "reorganization" and utilizes phrases of art in the law of reorganization, such as "fair and equitable," it does not in fact contemplate reorganization in the accepted legal definition of that word. If "reorganization" in the conventional sense were *possible*, there would have been no need for the RRRA.

As Judge Fullam noted in his concurring opinion below:

> "The Regional Rail Reorganization Act of 1973 represents the Congressional response to the unfortunate fact that the processes and concepts of

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[42]A total of $2.165 billion is authorized by Congress in the RRRA in the form of loans, guarantees and grants: $250 million for labor protection (Title V); $180 million for local rail continuation subsidies (Title IV); $1,500 million for obligations of USRA §210(b); $150 million for loans for acquisition, maintenance or improvements of property (§215); and $85 million for grants to railroads in reorganization (§213). To date, a total of $28.8 million has been made available to Penn Central, of which $10.8 million was in the form of a purchase of outstanding equipment obligations (see Order No. 1480 and Memorandum in Support thereof, Docs. Nos. 29 and 30 in the Joint Documentary Submission) and $18 million was in the form of a grant (see Order No. 1542 and Memorandum in Support thereof, Doc. No. 31 in the Joint Documentary Submission).

§77 outlined above proved inadequate to deal with the current plight of railroads in the Northeast. Section 77 is adequate only when a railroad's revenues are, or can reasonably be predicted to be, in excess of operation expenses.

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"Penn Central and most of the other bankrupt northeastern carriers do not generate net operating revenues, but incur large operating deficits. They cannot achieve reorganization on an income basis under §77." (JA 69-70).

The Congressional response, as reflected in the RRRA, is to mandate that all railroads in reorganization in the Northeast which cannot reorganize on an income basis (RRRA, §207(b)) convey their designated rail properties (§206(c)) to Conrail, a corporation controlled by United States government appointed officials (§301(d)), in exchange for: (1) stock and other securities of Conrail (§206(d)), including obligations of USRA (if affirmatively approved by a joint resolution of Congress—§206(i)—which in any event are limited to $500 million principal amount (§210(b)); and (2) the undefined "other benefits" accruing to such railroad by reason of such transfer (§206(d)). Once a railroad's reorganization court concludes that the railroad should be reorganized by means of conveyance of its rail properties to Conrail (§207(b)), there is no further judicial review provided until after the conveyances of property (§303(b)(1)) and the concurrent divestment of creditors' liens (§303(b)(2)) have been completed. The only "out" from the compulsion of the statute which a reorganization court could exercise if an income-based reorganization is not possible,[43] is a finding that "this Act does not provide a

[43]The reorganization courts supervising the Erie-Lackawanna and Boston & Maine reorganizations found that income-based reorganizations were possible, and thus avoided the compulsion of the RRRA.

process which is fair and equitable to the estate of the railroad in reorganization. . ." (§207(b), third sentence, clause (2)). This finding inherently requires a determination whether or not the processes of the RRRA would be unconstitutional as applied to the railroad.

In the case of Penn Central, the finding has been made that the RRRA does not provide a process which would be fair and equitable to the estate. *Opinion in Support of Order No. 1596, supra* (JA 124-52). The issue raised by this cross-appeal, asserting that the compulsory conveyance provisions of the RRRA violate the New Haven Trustee's constitutional rights, is essentially the same issue which has thus already been decided by the Penn Central Reorganization Court in favor of the New Haven Trustee. The Reorganization Court's decision, however, is subject to review by the Special Court (created pursuant to §209(b) of the RRRA).[44] The Special Court's decision is required by the terms of the sixth sentence of §207(b) to be rendered no later than September 30, 1974. Thus, as of the date of this Brief, it is not known whether the Special Court will decide (a) to sustain a plea of *res judicata*, based on the order of the court below in *Connecticut General* that the RRRA is unconstitutional in failing to provide just compensation in respect of erosion, (b) to affirm Order No. 1596 on the merits,

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[44]The Special Court is a three-judge district court consisting of Circuit Judges Henry J. Friendly (presiding) and Carl McGowan and District Judge Roszel C. Thomsen. It has before it appeals on the merits of Order No. 1596 (docketed as No. 74-8) by the United States, USRA and the ICC (in which the State of New Jersey and the Railway Labor Executives' Association has joined); and a cross-appeal by the New Haven Trustee limited to his jurisdictional contention that the jurisdiction conferred by §207(b) is void under Article III and under Article I, Sec. 8., Cl. 4 of the Constitution. The Penn Central Trustees, although partially aligned with the United States and USRA as to the "Tucker Act remedy" argument, are appellees in support of Order No. 1596 on the merits, as are all of the plaintiffs in *Connecticut General* and the related cases, *Smith v. United States* and *Penn Central Co. v. Brinegar*.

(c) to reverse Order No. 1596 on the merits in spite of the decision below, (d) to decline to reach the merits by finding that jurisdiction is improperly conferred by §207(b), or (e) to defer decision pending a decision by this Court of the appeals and cross-appeals from *Connecticut General* and related cases. The Special Court's decision will presumably have been made prior to the argument of this case. Whatever the Special Court's decision, appeals from its decision are purportedly excluded by the seventh sentence of §207(b).[45]

With this background, we turn to an analysis of why the Congressional "solution" requiring Penn Central, which is unable to reorganize in the conventional manner, to convey its rail assets to Conrail in exchange for stock and securities of Conrail and USRA, is necessarily a violation of the Fifth Amendment rights of secured creditors and other claimants to the Penn Central estate.

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[45]Jurisdictional appeals by the New Haven Trustee from orders Nos. 1543 and 1596 (120-day and 180-day orders under §207(b)) have been filed under §24 of the Bankruptcy Act with the Court of Appeals for the Third Circuit (Nos. 74-1501 and 74-1649). The former appeal was argued on July 18, 1974 and the Third Circuit panel reserved decision pending a decision by this Court in this case. The New Haven Trustee has acknowledged to the Court of Appeals that a favorable decision of his cross-appeal here would moot his jurisdictional appeals from the §207(b) orders and thereby avoid the necessity of decisions as to whether or not §207(b) is void under Article III of the Constitution and the doctrine of separation of powers.

B. The Compulsory Conveyance Provisions of the RRRA Involve an Intentional Taking, Not Compensated by Money or its Perfect Equivalent, of the Property of Penn Central in Violation of the Fifth Amendment Rights of its Creditors and Stockholders

The New Haven Trustee submits, for the reasons set forth below, that the compulsory conveyance provisions of the RRRA (§§206(c), (d), (f), (h) and (i)), 207, 208, 209(c) and (d) and 303(b) and (c), hereinafter collectively referred to as the "compulsory conveyance provisions," are constitutionally void on their face and as applied to Penn Central.

The RRRA authorizes for issuance to the estates of bankrupt railroads, which are subject to the compulsory conveyance provisions of the RRRA, only common stock of Conrail, other unspecified securities of Conrail which may be issued subject to the limitations set forth in §206(i), plus (if Congress concurs by joint resolution pursuant to §206(i)) not in excess of $500 million of obligations of USRA which might be guaranteed by the United States.[46] If the securities of Conrail plus any obligations of USRA authorized by Congress should be determined in the §303(c) proceedings to have less value than the "highest and best

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[46]The $500 million limitation is derived from §210(b), fixing the maximum obligational authority at $1,500 million of USRA securities, of which $1,000 million may be issued to Conrail. Of the latter amount, not less than $500 million is available solely for rehabilitation and modernization of rail properties. Under §206(i), the final system plan may include terms and conditions for any securities to be issued by Conrail in exchange for rail properties which in the judgment of USRA will minimize any actual or potential debt burden on Conrail, and any securities of Conrail which purport to obligate USRA shall not become effective without approval by joint resolution of Congress. Hence, without further action by Congress, even the $500 million of potentially available United States guaranteed debt securities is unauthorized. While Congress could amend the $500 million limitation of §210(b) by a joint resolution, the constitutionality of the RRRA cannot be made to depend on conjecture as to future actions which Congress may or may not take.

use" value of the designated rail properties conveyed, the only remedies allowed for by the statute are the possibility of the Special Court's ordering additional amounts of the same types of securities of Conrail specified in the final system plan(§303(c)(2)(B)), plus entering the §303(c)(2)(C) deficiency judgment against Conrail.

Judge Fullam aptly described the deficiency judgment provision of §303(c)(2)(C) in his opinion below as "essentially circuitous." (JA 77). If the Conrail common stock and securities are insufficient, a deficiency judgment against the property having insufficient value to support the securities representing the property will produce no possible satisfaction of the judgment. Moreover, even if the judgment were satisfied, Conrail's assets would be depleted by the same amount, thereby reducing the value of the common stock, creating a need for a further deficiency judgment. In his *Opinion in Support of Order No. 1596, supra*, Judge Fullam described the deficiency judgment as a "relatively pointless" remedy.(JA 137).

Neither the Penn Central Trustees, as intervening defendants below, nor the Governmental Defendants have presented any analysis of the RRRA which supports any contrary conclusion. The Trustees argued below that the compulsory conveyance provisions of the RRRA are unfair and inequitable to the Penn Central estate *unless* this Court definitively adjudicates that there is a Tucker Act remedy under 28 U.S.C. §1491 to take care of any "short fall" between the consideration provided by the RRRA and the constitutional minimum which would prove to be due under the Takings Clause of the Fifth Amendment.[47]

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[47]The Governmental Defendant's brief below was "in partial opposition to intervening defendants motion for summary judgment" (Doc.

(footnote continued on next page)

The Governmental Defendants likewise relied below upon the "Tucker Act remedy," but with a somewhat different emphasis. The Governmental Defendants argued that if USRA were able to design a final system plan under which Conrail could be shown to have the potential to earn net income before fixed charges, then the capitalized value of the prospective net earnings (*i.e.*, the value of Conrail common stock and its other securities for purposes of reorganization) would automatically *fix the value of the rail properties conveyed* to Conrail. However, recognizing that the value thus determined for rail properties of the bankrupt carriers might be far less than the liquidation value of those properties if sold for their highest and best use, the Governmental Defendants argued below that any constitutional "short fall" could be remedied by a suit in the Court of Claims against the United States.

The Court below unanimously rejected the "Tucker Act remedy" arguments of both the Penn Central Trustees and the Governmental Defendants. The New Haven Trustee asserts that this disposition was correct, and the point will be fully briefed in his Brief herein as an Appellee. In the instant Brief the New Haven Trustee will assume that the Court below was correct without argument of the question, and that no "Tucker Act remedy" exists for any failure of the stock and other securities of Conrail (including up to $500 million of obligations of USRA if subsequently authorized by Congress under §206(i)) to equal the "highest and best use" value of the Penn Central rail assets designated in a final system plan for conveyance to Conrail.

(footnote continued from prior page)

no. 12 in E.D.Pa.C.A. No. 74-1107, May 17, 1974) because the United States interposed the defense of sovereign immunity to any declaratory judgment that a "Tucker Act remedy" exists, while at the same time asserting the affirmative defense of an "adequate remedy at law."

In his motion for summary judgment below, the New Haven Trustee alleged that the RRRA constitutes a taking by force of law for a public use of the property of Penn Central of two types: (a) during the period from enactment of the RRRA through the date of conveyances under §303(b), as a law requiring that private property be devoted to public use without the owner being afforded a reasonable expectation of profit or return on his investment;[48] and (b) upon the happening of the §303(b) conveyances, as a law providing for the taking for public use of (i) the right, title and interest of Penn Central as owner in fee or as to a leasehold estate of the designated rail properties, and (ii) the right, title and interest of the New Haven Trustee as mortgagee and lienholder. The first type of taking was enjoined by the Court's order below. The instant cross-appeal deals with the failure of the Court below to enjoin the second type of taking.

There is no dispute that, once a §207(b) order compelling Penn Central to convey its property were to be entered by the Special Court,[49] the RRRA would, by force of law, inexorably require conveyance of designated rail properties of Penn Central to Conrail in exchange for the consideration of the types specified in the RRRA. There is also no dispute that the consideration specified in the RRRA does not include money.

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[48]The Court below granted this portion of the New Haven Trustee's motion for summary judgment.

[49]As is sought by the United States, USRA, the ICC and the other governmental parties who have filed a joint brief dated August 5, 1974 seeking to reverse Judge Fullam's Order No. 1596 (Special Court, Regional Rail Reorganization Act, No. 74-8). As noted above, the Penn Central Trustees, although they argue for a "Tucker Act remedy" to save the RRRA, are aligned with the creditors and stockholders of Penn Central as appellees in support of Order No. 1596 rejecting the RRRA as not being "fair and equitable" to Penn Central.

The New Haven Trustee submits that, once a taking of private property is established to have taken place under an Act of Congress, or to be the inevitable consequence of the implementation of such an Act, the implementing legislation must provide for payment to the owners of that property of the "full monetary equivalent of the property taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973).[50] See *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In *United States v. Miller*, 317 U.S. 369, 373 (1943), this Court held:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." (Footnotes omitted).

See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), where it was stated that:

> "The noun 'compensation' [as used in the phrase 'just compensation' in the Fifth Amendment], standing by itself, carries the idea of an equivalent. . . . And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. . . . This excludes the taking into account as an element in the compensation of any

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[50] The full quotation is as follows:

"The Fifth Amendment provides that private property shall not be taken for public use without 'just compensation.' 'And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken' *United States v. Reynolds*, 397 U.S. 14, 16 (footnotes omitted). See also *United States v. Miller*, 317 U.S. 369, 373."

> supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."[51]

The only question which remains, assuming that the "full monetary equivalent" test must be met, is whether the Congress is free to legislate, in connection with a taking, that something other than money shall be the equivalent of money. In other words, can Congress declare, for example, that the stock of Conrail is to be the legal equivalent of money and, if it does, what is the constitutional effect of that legislative declaration? The question was squarely presented in the *Monongahela Navigation* case, *supra*, and was squarely answered as follows:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question.* The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation.* The Constitution has declared that just compensation shall be paid, and the ascertainment of that

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[51]This holding was cited with approval by this Court in 1970 in *United States v. Reynolds*, *supra*, and the *Reynolds* decision was in turn cited with approval by the Court in 1973 in *Almota Farmers Elevator & Warehouse Co. v. United States*, *supra*. Thus there can be no doubt that the *Monongahela Navigation* decision in 1892 remains the current and authoritative holding of this Court on the issue.

is a judicial inquiry." 148 U.S. at 327 (emphasis added).[52]

In the compulsory conveyance provisions of the RRRA (particularly §§206(d), 303(b) and 303(c)), Congress has specifically legislated the nature and rule of the compensation to be provided to railroads in reorganization for the compulsory "transfers or conveyances" of their property. By providing as a limit on, and a test of, "just compensation," that the Special Court shall decide "fairness and equity" on the basis of solely (i) stock and possibly other securities of Conrail, (ii) obligations of USRA not exceeding $500 million principal amount, and (iii) "other [undefined] benefits," Congress is in contravention of the clear holding of the *Monongahela Navigation* case.

There is, in fact, but one medium of exchange which is the "perfect equivalent of the property taken," namely money prescribed by Congress as legal tender for the payment of all debts, public and private. While it has the power to declare what "money" is, and what shall be legal tender for payment of private and public debts, and even to override inconsistent provisions in private contracts,[53] Congress has no power to declare that something which is not money is, as a matter of law, the perfect equivalent of money. As the *Monongahela Navigation, Miller, Reynolds* and *Almota* cases make plain, the law on this subject has not changed since 1795 when it was stated:

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[52]See *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349,364(1936): "Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment." (Footnote omitted). The Court cited with approval the portion of the *Monongahela Navigation* opinion quoted in the text.

[53]As to the power of Congress to make Treasury notes legal tender, see *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871); *Juilliard v. Greenman*, 110 U.S. 421 (1884). As to the power of Congress to invalidate gold clauses in private contracts, see *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935); and see other "Gold Clause Cases" decided the same day.

"No just compensation can be made except in money. Money is a common standard, by comparison with which the value of any thing may be ascertained. It is not only a sign which represents the respective value of commodities, but it is an universal medium, easily portable, liable to little variation, and readily exchanged for any kind of property. Compensation is a recompense in value, a *quid pro quo*, and must be in money. True it is, that land or any thing else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him. His consent will legalize the act, and make it valid; nothing short of it will have the effect." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 313 (Circuit Court Pa. 1795).

These legal precedents establish that the RRRA is unconstitutional on its face and as applied to Penn Central, when considered as an exercise of Congress' Commerce Clause/eminent domain powers, and results in a permanent taking of the property of Penn Central and the New Haven Trustee without payment of just compensation in legal tender, in violation of the Fifth Amendment. As an eminent domain statute, not even the existence of a "Tucker Act remedy" under 28 U.S.C. §1491 to cover a "short fall" between the consideration provided by the Act and the "highest and best use" value of Penn Central's rail properties would suffice to render the statute constitutional, since claimants of Penn Central are entitled to *full payment* in money or its perfect equivalent. *Almota Farmers Elevator & Warehouse Co. v. United States*, *supra*, and other cases cited above. Whether or not the stock or other securities of Conrail have demonstrable value, such securities are plainly not money or its perfect equivalent.

In its *Opinion in Support of §207(b) 180-Day Findings in the Secondary Debtor Proceedings* (E.D. Pa. July 2, 1974) (JA 153-56), the Penn Central Reorganization

Court held unconstitutional the provisions of §§206(a)(3) and 601(d) of the RRRA, which require rail properties in the Boston-Washington passenger corridor to be sold or leased by Conrail to National Railroad Passenger Corporation (Amtrak), following the §303(b)(1) conveyances and the §303(b)(2) divestments of liens. The basis of this holding was that the RRRA, at least in this area, clearly involves an exercise of eminent domain powers without provision for payment of just compensation in money. Judge Fullam observed:

> "A further problem . . . arises in connection with the provisions of the Act dealing with the so-called "northeast corridor" from Boston to Washington. Virtually all of this property is owned by the Secondary Debtors[54] and leased to Penn Central. . . . The Government, in the present proceedings, has taken the position that Conrail will be able to raise $500 million in cash by acquiring the northeast corridor properties and then selling them to Amtrak pursuant to §601(d) of this Act. While the public purpose of these provisions of the statute is quite clear, *the constitutionality of that approach seems particularly dubious.* Certainly, if Congress were to give Amtrak the power of eminent domain, Amtrak could properly acquire the corridor properties. But I find it difficult to accept the theory that it is constitutionally permissible for the government to achieve that result by means of the RRRA, *without providing the present owners of the property with cash or its equivalent.*" (JA 155; emphasis added).

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[54]The corridor properties owned by the Secondary Debtors are located between New York City and Washington. Between the New York-Connecticut state line and Providence, R.I., the corridor properties are former New Haven properties which are subject to the New Haven Trustee's Mortgage and claimed equitable lien.

C. The Fifth Amendment Requires that a Railroad in Reorganization, Which Is Unable to Earn Net Railway Operating Income and Whose Properties Are Required to Be Continued in Perpetual Public Service, Be Paid Not Less than the "Highest and Best Use" Value of its Rail Properties

Aside from Tucker Act remedy considerations,[55] the gist of the contentions of the United States and USRA that the processes of the RRRA do not involve an unconstitutional taking of property rests on an assumption as to a valuation theory which appears to be a complete misreading of the holding of *New Haven Inclusion Cases, supra.* The point was specifically addressed in a colloquy between counsel representing the United States and USRA and Judge Fullam at the "180-day" hearing on June 10, 1974:

> THE COURT: "Perhaps it is the lateness of the hour, but it would seem to me one of the factors the Court would certainly have to consider in deciding whether this Act provides a fair and equitable process would be what the probable outcome or what the possible outcome would be at the valuation stage.
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> MR. CUTLER: "My difficulty with that is there are so many imponderables involved on both sides of that valuation equation.
>
> "To begin with, if a profitable railroad can be created, then it may be the only value that these estates are entitled to is the capitalized earning power of the profitable railroad. They may not be entitled to liquidation value. So you may not have to add in any other benefits at that point.

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[55]As noted above, the unavailability of a "Tucker Act remedy" is not argued in this Brief but will be discussed fully in the New Haven Trustee's Brief as Appellee.

"That is a point the Supreme Court expressly reserved in the New Haven case. It is one Judge Anderson never reached himself when he said that he thought the right thing was liquidation value, not because it is constitutionally required. So that is an open issue.

THE COURT: "Of course, it has always been assumed up until this point that going concern value was greater than liquidation value, hasn't it? Hasn't that usually been the assumption?

MR. CUTLER: "The point was in the earlier reorganization cases that may very well be true, the early going concern value cases, but the precise point was reserved, as I said, by the Supreme Court in the New Haven case. So there is an open issue.

"If a profitable railroad can be created, even if it is a billion-dollar railroad, let's say its value capitalized is a billion dollars, and the liquidation value were theoretically more, that doesn't automatically demonstrate that the consideration to be paid is less than a constitutional minimum. That is an open point.

"As to liquidation itself, there are many open points, as you know. There are discounts to be applied. There are the problems of succeeding in abandonments, all of the different things that the Supreme Court considered in the New Haven case." (Transcript of June 10, 1974 hearing, E.D. Pa. No. 70-347, on the 180-day findings pursuant to §207(b) of the RRRA, at pp. 12, 610-12).

In his *Opinion in Support of Order No. 1596, supra,* Judge Fullam noted that this theory of valuation appears in the legislative history to be the basic rationale of the RRRA.

"The legislative history of the Act suggests that many responsible public officials may be proceeding on the assumption that the Common Stock of Conrail (i.e., the capitalized value of its prospective earnings) necessarily and automatically estab-

lishes the value of the rail assets conveyed to Conrail, even if those assets had a higher liquidation value, and even though their value for 'highest and best use' might be much greater." (*Opinion in Support of Order No. 1596, supra*; JA 138).

The Government argues in effect that the value of Penn Central's rail assets can, for Fifth Amendment purposes, be valued solely by reference to the value of the securities issued by a *buyer* of the properties in a context where the properties are the only asset of the buyer. The argument is thus both circular and question begging where the issue is whether the *seller* could realize greater value by a sale of its properties for non-rail use, or by condemnation of its properties by a public authority for continued rail use, or a combination of both. The New Haven Trustee submits that the Government's circular reasoning does not in any event withstand close analysis of the holding of this Court in *New Haven Inclusion Cases, supra.*

Mr. Justice Stewart's opinion (399 U.S. at 481-82) discussed the contention of the New Haven Bondholders "that Penn Central should pay an added amount [in addition to per-parcel sale liquidation value] to reflect the 'going-concern' value of the New Haven." This particular contention was rejected by the Court, not because it was reserving any issue, but because it considered that such payment would give the New Haven Bondholders "the best of both worlds" (*Id.* at 482), a result which the Court found would be "unfair" and "inequitable" to Penn Central (*Id.*). Of particular significance to the instant case is that the Court distinguished the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases,[56] cited in 399 U.S. at 482, note 80, on the

[56] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub nom. Fifth Avenue Coach Lines v. City of New York*, 386 U.S. 778 (1966); *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 734, *cert. denied sub nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1967).

ground that:

> "In neither of these cases did the New York courts require the taking authorities to pay *both* an operating and a liquidating value. Rather, they awarded the owners the value reflecting the highest and best use for their properties—precisely the treatment accorded the New Haven here." (Emphasis in original).

The New Haven Trustee submits that the findings made by Congress in the RRRA, §101(a), constitute a recognition that the railroad properties of Penn Central are, in the words of one of the Government briefs below, an "irreplaceable national asset." As such, the highest and best use value of at least Penn Central's principal rail properties is presumptively for continued railroad use by one or more public authorities. The New Haven Trustee submits that, prior to the valuation hearings by the Special Court (RRRA, §303(c)) at which a definitive theory of valuation of Penn Central's rail properties can be decided upon, the facial constitutionality of the RRRA must be adjudged in the light of the constitutional requirement that valuation of a debtor railroad's rail properties be based on "highest and best value" in the words of Mr. Justice Stewart, and not on an automatic application of a predetermined valuation technique.

On the New Haven's facts, both Judge Anderson and this Court found that liquidation value was greater than going concern value.[57] In both the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases, the transportation entities were in a hopeless loss situation, and yet they were "irreplaceable" local assets which the public authorities would not tolerate being abandoned and sold piece-meal. The New Haven Trustee submits that Penn Central's case is analogous to *Fifth Avenue*

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[57] *In re New York, New Haven & Hartford R.R.*, 289 F. Supp. 451, 454-55 (D. Conn. 1968); *New Haven Inclusion Cases*, *supra*, 399 U.S. at 481-82.

Bus and *Hudson Rapid Tubes*, and §101(a) of the RRRA confirms this to be so. In *Fifth Avenue Bus* and *Hudson Rapid Tubes*, the amount awarded to the owners of the transportation facility was somewhere between scrap value (argued for by the taking authority) and reproduction cost new, less depreciation (argued for by the owners of the property). This mid-point represented application of the valuation principle of "highest and best use" to the facts of those cases.

All the *New Haven Inclusion Cases* decide is that where, under the peculiar facts of that case, value based on "highest and best use" was equal only to liquidating value for non-rail use, the Court would not compel payment of a greater amount. The Court's opinion does not stand for the proposition that going concern value, *when less than liquidation value*, could be judicially approved as meeting the test of "highest and best use."

It is in light of the discussion at 399 U.S. at 481-82 that one must read the following single sentence of the Court's opinion (399 U.S. at 490) upon which Government counsel presumably relied in his oral argument (see Transcript of June 10, 1974 hearing at p. 12, 637):

> "Nor is it necessary to consider the bondholders' claim that anything less than full liquidation value would amount to an uncompensated taking in violation of the Fifth Amendment."

This sentence is immediately preceded by the following passage which, it is submitted, is totally inconsistent with the Governmental Defendants' reliance on that sentence for its "reservation of issue" position:

> "The purchase price that the Commission and the reorganization court have required Penn Central to pay to the New Haven estate is based upon the liquidation value of the seller's assets, appraised as of

> December 31, 1966. That price hypothesizes a shutdown of New Haven, followed by a sell-off of its assets *at their highest and best value*. In the circumstances of this case, and for the reasons we have already set out at length, we agree with the reorganization court that it would be unfair and inequitable to allow Penn Central to take the properties for any lesser sum. Moreover, we today require a reassessment of the consideration that Penn Central is to give in exchange for those properties. We thereby accord the bondholders the right to a liquidation and a per-parcel sale that is theirs by virtue of their mortgage liens. The Bankruptcy Act does not require that they be given more." 399 U.S. at 489-90 (emphasis added).

The portion of Judge Anderson's August 13, 1968 opinion presumably relied upon by the Governmental Defendants is the following two sentences:

> "It is the opinion of the court that the Penn-Central should pay to the Trustees of the New Haven at least the liquidation value of the New Haven as of December 31, 1966. This is so not because the Constitution necessarily requires it but because that standard, under the circumstances of this case, is fair both to the creditors and to the Penn-Central." 289 F. Supp. at 454.

It is submitted that neither Mr. Justice Stewart nor Judge Anderson was reserving the issue as to whether the New Haven Trustees could, consistent with the Fifth Amendment, have been paid *less* than liquidation value. Rather, each court was limiting its respective opinion to the facts of the New Haven situation. Each court concluded that the "highest and best use" value of the New Haven's rail assets was to be measured by a hypothetical liquidation and per-parcel sale for non-rail use. Judge Anderson (289 F. Supp. at 454) refers to the "constitutional minimum of value" as to which the creditors were "entitled," and that those "rights of

creditors cannot be arbitrarily sacrificed or restricted . . . ." It is wholly inconsistent with Judge Anderson's "constitutional minimum" language to read into his opinion an intent to reserve the issue that creditors of a railroad in reorganization might be entitled to less than liquidation value and a per-parcel sale in a situation where "going concern value" was less than liquidation value. This is particularly true since Judge Anderson specifically rejected the "going-concern value" arguments of the New Haven Bondholders because:

> "The concept of 'going concern value' is fictional as applied to the New Haven because it ignores the Railroad's long and continuous history of deficit operations." 289 F. Supp. at 455.[58]

In the case of the Penn Central System, it is now *res judicata* that its railroad properties are not reorganizable on an income basis (Order No. 1543 (JA 103); the governmental parties to this case have not appealed this order). Penn Central's rail properties thus have no "going-concern value." Penn Central is in the same position now that New Haven was in the 1960's. The Government's "capitalized earning power" argument amounts to this: if there had been no Penn-Central merger to serve as the medium by which rail service in the New Haven's territory could have been maintained consistent with the protection of creditor rights which is mandated by the Fifth Amendment, it would have been open to Congress to enact a law under which the New Haven Trustees would have been

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[58]See *New Haven Inclusion Cases*, *supra*, 399 U.S. at 436:

"In approving the negotiators' approach to the price question, the Commission observed that asset value rather than earning power was the primary determinant because 'New Haven had long been dry of earning power.' 331 I.C.C., at 657. 'If there is one thing on this record that is clear and undeniable,' the Commission concluded, 'it is that N[ew] H[aven] has neither earning power nor the prospect of earning power.' *Id.* at 687."

compelled to convey to a nominally private (but governmentally controlled) rail corporation a designated portion of New Haven's rail properties in exchange for common stock and possibly other securities of this new entity, all without benefit of any "underwriting" to assure that the value of this package of securities was equal to $174,635,899, the amount finally approved as the "highest and best use" value of New Haven's assets. Moreover, the Government argues that the capitalized value of the earnings predicted to be earned by the *buyer* of the designated rail properties determines their value to the *seller* even though such properties might have a higher value to the *seller* if sold for non-rail use or if condemned by one or more public authorities. Such an argument confuses the "apples" of the theory of capitalized value in an earnings-based reorganization with the "oranges" of the basic rationale of bankruptcy law, that a debtor's property be applied for the benefit of claimants to its estate in the order of the priority of their claims. This represents a sharp departure from any prior decision of this Court, including most particularly the *New Haven Inclusion Cases*, upon which the Government seeks to rely for its theory of valuation.

D. The RRRA Is Constitutionally Defective in Requiring Payment for Rail Assets in the Form of Securities of Conrail Without Any Provision for a Guarantee that the Value of Such Securities Will Be the Perfect Monetary Equivalent of the "Highest and Best Use" Value of the Rail Assets

This section of the Brief analyzes the nature of Conrail as a governmentally created and controlled entity, the facts in the record as to the value of the rail properties comprising Penn Central's System under the "highest and best use" standard of the *New Haven Inclusion Cases*, and the reasons why securities and common stock of Conrail, plus an amount of governmentally guaranteed debt instruments not exceeding $500 million, could not be viewed as the perfect equivalent of the "highest and best use" value of the portion of Penn Central's rail assets to be designated for conveyance to Conrail under the RRRA.

Although the *compulsory* features of the RRRA are sufficient, by themselves, to distinguish the RRRA from any prior law "on the subject of bankruptcy" heretofore enacted,[59] it is the governmental control of Conrail which most clearly marks the RRRA as an exercise of the Commerce Clause/eminent domain powers of Congress. Compulsory conveyance of properties to a governmentally created and controlled cor-

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[59]It is true, of course, that the "cram-down" feature of §77(e), upheld in the *Denver & Rio Grande* case, *supra*, represents an element of judicial compulsion; however, the court in §77(e) is required to find that a plan rejected by a class of creditors "makes adequate provision for fair and equitable treatment for the interests and claims of those rejecting it" and "such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it . . . ." In the RRRA, by contrast, there is no voting by creditor or stockholder claimants to the railroad's estate, nor any judicial proceedings to determine that their rejection of Congress' plan "is not reasonably justified" in the light of their rights and interests.

poration is not a feature of any prior "law on the subject of bankruptcies." The New Haven Trustee has no quarrel with the Congressional decision to place control of Conrail in the hands of the United States and its agencies in view of the extensive governmental financial commitment to Conrail. But Conrail will necessarily be as much a creature of Congress' will as are Federal Deposit Insurance Corporation, Securities Investors Protection Corporation, and National Railroad Passenger Corporation. These are "nominally" private corporations which, however, serve primarily non-private purposes. Conrail is simply not fairly characteristic of "private enterprise." It is "government enterprise" in its creation, financing and control.

The "government enterprise" nature of Conrail may be judged by the following legislative history:

> MR. KUYKENDALL: "Mr. Speaker, is it not true, I will ask the gentleman from Washington (Mr. Adams) that the creditors are of course given protection, and that the Board of Directors, under the control of Government officials, is the owner of the entire block of 100 million shares, whatever it is?"
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> MR. ADAMS: "The gentleman is correct. It is controlled by the United States, so long as the Secretary determines that there is an amount of obligation funds which the United States might, in any way ever, have anything to do with.
>
> "During that period of time, it is controlled by a board of directors which consists of Government officials." 119 Cong. Rec. H 11876 (daily ed. December 20, 1973).

The provisions vesting control of Conrail in the United States Government are set forth in §301(d) of the RRRA: so long as 50% or more of Conrail's indebtedness constitute debts owed to, or guaranteed, by USRA or the United States, eight of the fifteen direc-

tors of Conrail will be government officials or persons appointed by the President with the advice and consent of the Senate.[60] Thus, the owners of 100% of the common stock of Conrail will be effectively without voice, having at best 7 of 15 votes on the Board of Directors. Since management decisions will be vested in the Board of Directors by whatever state law Conrail is incorporated under (§301(b)), the owners of the stock of Conrail can expect that Conrail will be managed in the public interest whenever the public interest conflicts with the private interests of the stockholders.

When the RRRA is viewed solely as a "law on the subject of bankruptcy," the following factual distinctions set it apart from any prior exercise of the Bankruptcy Clause power: (1) the RRRA provides for a type of "reorganization" which does not depend on private claimants to the estate seeking the "reorganization" or voting upon it; (2) the "reorganization" is required to be implemented over the unanimous dissent (as exemplified by the present three constitutional complaints before the Court) of the private creditor and stockholder claimants; (3) the "reorganization" does not by its terms insure that private secured claimants will receive the equitable equivalent of a hypothetical foreclosure of their liens, measured by the "highest and best use" value of the properties subject to such liens;[61] and (4) the RRRA

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[60]The 50% test is likely to be met for a considerable period of time if the Conrail's experience parallels that of Penn Central. Private debt and capital markets have indicated a marked reluctance to lend money to Penn Central except with government guarantees. See *In re Penn Central Transportation Co. (Opinion in Support of Order No. 124 approving $100 million of Trustees' Certificates)*, 325 F. Supp. 302 (E.D. Pa. 1971).

[61]The United States and USRA have for the first time contended before the Special Court that:

"USRA and this [the Special] Court on review under Section 303(c),

(footnote continued on next page)

provides that private claimants, in exchange for their legal liens upon tangible physical property, will receive common stock and other securities of a government-controlled, nominally privately incorporated, corporation. The common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise. Thus the Penn Central claimants, as potential owners of the vast majority of the shares of common stock of Conrail to be issued, would not have control of the Board of Directors of Conrail, or the right to select its executive officers, or the right to discharge management for incompetence or poor economic performance, or the right to declare dividends when deemed appropriate, or the right to pass on the terms of any debt, or the right to avoid political appointments to a Board whose decisions would entail financial and fiduciary responsibilities, or the right to sell their stock on the New York Stock Exchange or possibly other national securities exchanges,[62] or the right to be assured that they could

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(footnote continued from prior page)

are empowered to provide for the issuance of such Conrail debt securities as they deem necessary or appropriate – including bonds secured by liens on specific properties identical in all security respects to the liens that presently attach." Brief of United States, *et al*, dated August 5, 1974 (Special Court No. 74-8).

While this argument might have some persuasive force if USRA were *required* by the RRRA to issue fixed income mortgage bonds secured by first mortgage liens to the extent of the "highest and best use" value of the rail properties subject to existing mortgage liens divested under §303(b)(1), this is not the case. If USRA designs the final system plan without fixed income mortgage bonds (or if Congress rejects such a proposal when the plan is submitted to it under §208), the Special Court will be unable to remedy the deficiency under §303(c)(2)(B) because that section is expressly limited to "securities of the Corporation. . .as designated in the final system plan."

[62]The provision that a majority of the directors of Conrail be elected by the Government, leaving only a minority to be elected by the holders of 100% of the common stock, would violate the New York Stock Exchange "Policy as to Non-Voting Stock" (New York Stock Exchange, Company Manual, §A-15); see also the rule as to "Unusual Voting Provisions" (*id*). The American Stock Exchange has a similar rule.

sell their stock to the United States or one of its agencies at the price at which it was valued when it was required to be accepted as "payment" of their claims secured by liens on Penn Central's rail properties.[63]

In terms of Congressional intent, it is reasonably clear from the legislative history that Congress was motivated almost entirely by a view of the Constitution which proceeds from the premise, in Senator Hartke's words, that the common stock of Conrail can be "crammed down" on the creditors, and that "judges have ruled that this is fair." 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973; remarks during debate on Conference Report accompanying H.R. 9142).[64] This view seems to stem from a mis-reading of *New*

[63]Compare the "underwriting" of the Penn Central Common Stock required by the New Haven Reorganization Court, *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793 (D. Conn. 1969), *aff'd in part, rev'd in part, New Haven Inclusion Cases, supra*. It is of course highly significant that a majority of this Court in 1970 believed that Judge Anderson's "underwriting" concept was a sound and necessary provision to assure the New Haven estate's claimants that they would in fact receive the equitable equivalent of the "highest and best value" of New Haven's rail properties, and found it necessary to remand the case because the Court perceived that the underwriting might well have become unrealistic by virtue of Penn Central's subsequent §77 petition. If the RRRA were to be sustained in this Court, the 1970 decision of this Court remanding the underwriting plan because of its insufficiency would be largely mooted since the New Haven's First Mortgage Bondholders would ultimately receive, at best, non-underwritten stock and securities of Conrail, in exchange for which Conrail would receive the bulk of the New Haven's assets valued at $175 million in 1966 for which payment remains to be made.

[64]The entire quotation is as follows:

"We are providing that the creditors of this corporation would be required to take common stock in the *new quasi-government operation*. In other words, they are exchanging their present security interest in the rail properties for common stock in the new corporation.

"The railroad properties then become the properties of the new corporation free and clear of liens and encumbrances. In other words, the assets are being transferred and the rights are being changed. The nonrailroad property will remain in the bankruptcy court to be

(footnote continued on next page)

Haven Inclusion Cases, supra, and *Penn Central Merger Cases, supra,* since there is no other authority to support it. The Congressional theory underlying Senator Hartke's thesis must be based on the Bankruptcy Clause, since there are no cases which could be read to stand for the proposition that, for example, Congress could flood a farmer's land as a result of construction of a hydroelectric dam, and require him to accept stock of TVA instead of money for his property.

As a "law on the subject of bankruptcy," however, the RRRA is void as a violation of *substantive* due process. It is a deprivation of property without due process for Congress to divest a creditor of his contractual lien created under state law, and give him in exchange a piece of paper stripped of the normal attributes of an investment security, no matter what aspects of procedural due process are accorded.

The leading cases in which this Court explored the outer limits of Congress' power to pass laws for the relief of debtors from the claims of their secured creditors are the *Rock Island*[65] case, and the *Radford* and the two *Wright*[66] cases under the Frazier-Lemke Act and the amended Frazier-Lemke Act. In the *Rock Island* case, the Court upheld an injunction against fore-

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dealt with by them. One can talk about what is available if the railroad is liquidated and put through the wringer, but even then the chances of these creditors getting their money is relatively slim, and *this country cannot afford cessation of rail service* while the railroads are put through the wringer. So what, in effect, is called the 'cram down' theory forces them to accept this kind of settlement and judges have ruled that this is fair." (Remarks of Senator Hartke; 119 Cong. Rec. S 23783-4 (daily ed. December 21, 1973); emphasis added).

[65] *Continental Ill. Nat. Bank & Trust Co. v. Chicago, R.I. & Pac. Ry.*, 294 U.S. 648 (1935).

[66] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Wright v. Vinton Branch Mountain Trust Bank*, 300 U.S. 440 (1937); *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940).

closure of a pledge in a §77 case against the contention that it represented an impairment of contract in contravention of the Fifth Amendment. The Court reasoned that "the injunction here goes no further than to delay the enforcement of the contract." 294 U.S. at 681. In *Radford* and the two *Wright* cases, there was no question of a governmental "taking;" the beneficiary of both Frazier-Lemke Acts was the debtor-farmer, and there was neither a government controlled entity involved nor any "public purpose" other than relief of poverty. The rationale of these four cases is that the Bankruptcy Clause and the Fifth Amendment can together support a law which effects a *brief moratorium* on foreclosure of a pledge or a mortgage lien, coupled with an option in the mortgagor at the end of the period to purchase the mortgagee's interest for *cash* equal to the *appraised value* of the property. This result, it is submitted, is not different from the hypothetical liquidation per-parcel sale value of the *New Haven Inclusion Cases*. By implication in all four cases (and express holding in *Radford*), a Bankruptcy Clause enactment (not supported by any possible exercise of eminent domain powers), which deprives a pledgee or mortgagee to a greater extent (such as, for example, divesting his lien and paying him less than appraised value, or not paying him in cash at all but giving him an unsecured or junior obligation of the debtor which is not the equitable equivalent of his secured claim), is a violation of the Due Process clause of the Fifth Amendment.

Thus, §303(b)(2) of the RRRA, by which mortgage liens of creditors are divested *prior* to any judicial determination that the consideration received by the bankrupt debtor upon conveyance of the property is the "fair and equitable" equivalent of the properties valued at their "highest and best use" value, is de-

ficient as Bankruptcy Clause legislation on due process grounds. This is a defect apparent on the face of the RRRA unless it can be reasonably determined that the "highest and best use" value of the designated portion of Penn Central's rail assets will be $500 million or less, that being the amount of obligations of USRA contingently[67] authorized to be included in a final system plan as payment to all estates of railroads in reorganization which convey rail assets under §303(b).[68]

Once it is determined that the stock and other securities of Conrail are not necessarily equal to the "highest and best use" value of the rail assets of Penn Central which would be required to be conveyed under a final system plan, and that the §303(c)(2)(C) deficiency judgment is "essentially circuitous," all that remains to test the facial constitutionality of the compulsory conveyance provisions of the RRRA is to assess whether and under what circumstances this $500 million of theoretically available debt securities (which might or might not carry the full faith and credit of the United States) would tend to provide the Penn Central estate with a total package of securities which could be said to be the "fair and equitable equivalent" of its rail properties.

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[67]Under RRRA, §206(i), any provision in the final system plan which purports to create a direct obligation of USRA is subject to affirmative approval by a joint resolution of the Congress. As noted above, the $500 million limitation is derived from §210(b). There is no assurance that this $500 million of USRA obligations would carry the guarantee of the United States. Section 210(c) of the RRRA provides:

> "The Secretary [of Transportation] shall guarantee the payment of principal and interest on all obligations issued by the Association in accordance with this Act *and which the Association requests be guaranteed.*" (Emphasis added).

[68]Even if the full $500 million of government guaranteed USRA obligations is made available in the final system plan, Penn Central's estate would at best receive only a pro-rata portion since the estates of four other Class I railroads and one Class II railroad would be entitled to pro-rata participation.

To date no definitive valuation findings relating to the rail assets of Penn Central have been made by either the ICC (whose jurisdiction in this area is exclusive under §77(e)) or by the Penn Central Reorganization Court, nor have any hearings been held at which valuation evidence could be administratively or judicially tested. The lack of definitive valuation proceedings, such as those reviewed by this Court in *New Haven Inclusion Cases*, is a consequence of the ICC having failed to formulate any plan of reorganization, and its rejection for various reasons of those plans submitted to it.[69] No valuation hearings have been held by the Penn Central Reorganization Court because it has had no plan certified to it by the ICC. Unless the RRRA is held to be unconstitutional, valuation hearings will *never* be held until after the irrevocable conveyance of Penn Central's rail properties, free of lien, to Conrail.[70]

The evidence before the Reorganization Court on valuation of Penn Central's rail properties consisted primarily of a Day & Zimmermann study which had originally been placed in the Penn Central Reorganization Library established pursuant to Order No. 1179 and was subsequently, in a revised form, filed with the ICC.[71] The Day & Zimmermann study

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[69]ICC Report dated September 28, 1973, *supra*, Doc. No. 54 in the Joint Documentary Submission.

[70]The failure of the RRRA to provide for a definitive hearing on valuation evidence in connection with fair and equitable findings is indicative of the statute's shortcomings under the due process clause of the Fifth Amendment.

[71]Day & Zimmermann, Inc., "The PCTC Physical Asset Valuation Study," April, 1973; Doc. No. 58 in the Joint Documentary Submission; Revised Study, May, 1973, Appendix 1 to Exhibit T-21 (witness: Carlisle) in ICC Finance Docket No. 26241, *In re Reorganization Proceedings of Penn Central Transportation Co.*; Doc. No. 40 in the Joint Documentary Submission. The Reorganization Library was established pursuant to petitions filed by the New Haven Trustee (see petition dated March 16, 1973; Doc. No. 12 in the Joint Documentary Submission), and Morgan Guaranty Trust Co.

estimates the value as of December 31, 1970 of the physical assets of Penn Central and all its leased lines (exclusive of commercial properties owned by Penn Central and its leased lines in the area of Grand Central Terminal, New York City, referred to as "Park Avenue Properties"). The Day & Zimmermann study includes, in part, land not required for rail use, and lines of railroad which USRA might determine should be abandoned rather than included in a final system plan. It is impossible to know at this time what proportion of the Penn Central rail assets studied by Day & Zimmermann would be included in a final system plan. See Stip. Fact, ¶¶4, 5, 6. It is reasonable and conservative to project, however, in terms of the value of all physical assets of Penn Central and its leased lines studied by Day & Zimmermann, that the Penn Central properties designated in a final system plan would be likely to comprise not less than 50% of the total value of the physical assets of the Penn Central System.[72]

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[72]For example, the New Haven Trustee's Plan dated June 27, 1973 for reorganization of Penn Central, submitted to and rejected by the ICC in its September 28, 1973 Report, called for a reduction in route miles from some 20,000 route miles owned by companies in the Penn Central System, of which some 19,000 miles are now operated, to 11,000 route miles; the 11,000 mile "core system" would have required substantially more than half the total value of the physical assets of the Penn Central System which were included in the valuation study prepared by Day & Zimmermann. As the ICC noted in its Report, the 11,000 mile system was selected by the Penn Central Trustees with the aid of computer projections solely on the basis of maximizing profitability. To the extent that the final system plan were to implement the goals set forth in clauses (2) through (8) of §206(a), and not merely that of clause (1), it is reasonable to anticipate that a final system plan would involve more than 11,000 route miles of rail properties of the Penn Central System. The ICC, in its September 28, 1973 Report, observed:

> "The size of this reduced core system [which could be a viable system] will probably lie somewhere between the present [20,000 mile] system and the 11,000-mile and 15,000-mile core systems developed by Wyer [Dick & Co.]." ICC Report, Doc. No. 54 in the Joint Documentary Submission, App. DD, p. 5.

Two different approaches to valuation were presented by the Day & Zimmermann study—one based on a continued rail use methodology, and the other based on an assumed liquidation for non-rail use. In the case of the latter methodology, a present value of a projected stream of future liquidation proceeds was also calculated. In summary, the results of the Day & Zimmermann study were as follows:

Assumption as to "Highest and Best Use"	Total Value of Wholly Owned Assets, Penn Central and Leased Lines as of December 31, 1970[73]
Continued Railroad Use	$13,585,493,000
Liquidation for Non-Rail Uses:	
Estimated Gross Proceeds of Sales over a Period of Years	$ 3,532,110,000
Present Value of Estimated Net Proceeds, after deducting interest factor and all expenses of sale and of preservation of assets pending sale	$ 1,995,778,000[74]

While the Day & Zimmermann valuations remain to be definitively determined by administrative and judicial proceedings, and they are now some 3-1/2 years out of date, they do provide basic evidence upon

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[73]Doc. No. 40 in Joint Documentary Submission.

[74]The present value approach results in *negative* values being assigned to certain leased lines; for example, New York Connecting R.R. has an assumed negative value of $2,898,000, after deducting $8,844,000 as the net cost of demolishing its bridges and tunnels. This is an aspect of the "scrap value" approach which is totally inconsistent with preservation of an "essential national asset." Cf. *In re Port Authority Trans-Hudson Corp., supra*; explained in *New Haven Inclusion Cases, supra*, 399 U.S. at 482 n. 80:

> "The tunnels, which required only $88,000 to be put in working order, had cost $32,000,000 to build, and would have cost $400,000,000 to replace; their liquidating value was a negative figure, because of costs that would have been incurred in plugging them up. [Citation omitted]. Because the Port Authority was taking the tunnels for continued operation, the Court of Appeals held that that the proper valuation was depreciated original cost plus the value of intangible assets also attributable to the operation as a going concern."

which the court below could have properly concluded that $500 million of USRA securities, even if authorized under §206(i) by the Congress, would not have the remotest likelihood of equalling payment in full for the "highest and best use" value of the Penn Central properties likely to be included in the Conrail system. As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> ". . . it is clear on the record in this case that rail assets of Penn Central would comprise a very large percentage of the total Conrail system, and there is every reason to suppose that the included properties would be worth considerably more than $500 million. Since no one knows, or can know, at this time, the value of any stock or other securities which Conrail might issue, it would be highly imprudent to assume that there will be no need to resort to the deficiency judgment. Yet obviously, such a judgment would be relatively pointless, serving merely as a further reduction in the value of the common stock." *Opinion in Support of Order No. 1596, supra* (JA 137).

In fact, even using the discounted scrap value approach of Day & Zimmermann (an approach which the New Haven Trustee contends would be wholly erroneous under the *New Haven Inclusion Cases*), and assuming only 50% of the physical assets of the Penn Central rail system would be included in the Conrail system pursuant to the final system plan, one is forced to the conclusion in analyzing the constitutional impact of the RRRA that in no event could a value for the Penn Central rail assets conveyed to Conrail be assumed to be less than $1 billion.[75]

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[75]While the factual record as to valuation of Penn Central's rail properties is not nearly so complete as was the record of the ICC and the New Haven Reorganization Court which was reviewed in *New Haven Inclusion Cases*, the responsibility for an inadequate record does not belong to the Penn Central claimants since Congress has ordered that an irrevocable decision to convey or not to convey Penn Central's rail assets to Conrail be made in advance of any valuation hearings.

Where a *prima facie* case shows that the valuation of Penn Central rail assets required to be conveyed under the RRRA must exceed $1 billion, the Government should not be heard to argue that it is premature to judge the constitutionality of a statute which, under the most generous construction, would guarantee the estate of Penn Central (together with the estates of all other railroads whose property is included in the final system plan) at most the equitable equivalent of $500 million of value in the form of governmental obligations. Since the RRRA provides that reorganization by conveyance of Penn Central's rail assets to Conrail is mandatory, unless the RRRA is struck down as unconstitutional, or the processes of the RRRA are held not "fair and equitable" by the Special Court, this Court is required by the evidence to decide that the consideration afforded by the RRRA is not assured of being the "equitable equivalent" of the "highest and best use" value of Penn Central's designated rail properties. The situation is not essentially different from the decision in the *New Haven Inclusion Cases* where the uncertainty as to the ability of Penn Central to honor the "underwriting" commitment imposed by the New Haven Reorganization Court caused this Court to reverse and remand an otherwise acceptable plan of reorganization:

> "The fairness and equity that are the essence of a §77 proceeding forbid our approval of a payment for the transferred New Haven properties that may be worth only a fraction of its purported value. . . . Accordingly, we set aside the order of the Connecticut District Court insofar as it determines that an intrinsic value of $87.50 inheres in the Penn Central common stock and implements an underwriting plan to secure payment of that sum." *Id.* at 488-89.[76]

[76]This Court's remand on the "underwriting" issue has never been implemented; Judge Anderson attempted to implement it by imposing

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Furthermore, in a context of legislation providing for a public authority (Conrail) to acquire and operate the railroad's properties after divestment of the mortgage liens, the Fifth Amendment requires the public authority to pay, in addition to liquidation value, an incremental factor for "assemblage" of a complete transportation facility. *In re Penn Central Transportation Co. (Opinion and Order No. 1507 re Philadelphia Area Commuter Service)* (E.D. Pa. March 18, 1974) (Slip opinion, p. 12). See *In re Port Authority Trans-Hudson Corp., supra; In re City of New York (Fifth Avenue Coach Lines), supra.* See also Fullam, J., concurring:

> "As a matter of simple maximization of values, if there is no 'going concern' value in the usual sense, there is no justification for continuing a reorganization proceeding [footnote omitted], unless either or both the following conditions are established: . . .(2) a reasonable prospect that the *public need for preserving the debtor's railroad is such that it will be appropriated for public use, and the values inherent in its assemblage as an operating railroad will be recognized and paid for.* [citations omitted]" (JA 70-71; emphasis added).

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an equitable lien on certain properties conveyed by New Haven to Penn Central, and a constructive trust on Grand Central Terminal income, *In re New York, N.H. & H. R.R.*, 330 F. Supp. 131, 150, 331 F. Supp. 212 (D. Conn. 1971), but this judgment was reversed by the Court of Appeals, 457 F. 2d 683 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972) on the jurisdictional grounds that the New Haven Reorganization Court should have deferred to the ICC as to the remand issues. The ICC has "reopened" its proceedings in the New Haven matter, and consolidated them with the Penn Central reorganization proceedings. Order dated September 13, 1973. However, no further hearings have been set by the ICC on the remand issues in spite of the New Haven Trustee's petition dated Feb. 21, 1973 which urged a prompt determination by the ICC of the remand issues. The Penn Central Reorganization Court, *In re Penn Central Transportation Co. (Order No. 546)*, 337 F. Supp. 779 (E.D. Pa. 1972), declined to adjudicate the equitable lien and constructive trust issues, but imposed a protective temporary lien "indeterminate in amount and indeterminate in priority" pending adjudication of the New Haven Trustee's proof of claim.

The RRRA violates the due process and takings clauses of the Fifth Amendment by failing to provide compensation to bondholders of Penn Central, in exchange for divestment of their liens, equal to the "highest and best use" value of their properties, whether that value be determined under either a liquidation value approach or a continued rail use approach. No case can be cited where a court has ruled that the result required by the RRRA "is fair," statements in the legislative history by Senator Hartke to the contrary notwithstanding.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "I am satisfied, therefore, that the use of common stock to pay for the rail assets conveyed pursuant to the Final System Plan cannot be justified on the basis of any constitutional doctrine yet announced by the Supreme Court. In my view, the RRRA in its present form does violence to the Constitution, whether considered as a reorganization statute, or as an eminent domain statute, or as a combination of the two." *Opinion in Support of Order No. 1596, supra* (JA 146).

E. A Requirement that Rail Properties of Penn Central Be Exchanged for Securities of Conrail Is a Denial of Constitutional Rights to Dismissal of the Reorganization Proceedings and Termination of Loss Operations

In the case of a railroad whose rail operations do not produce income in excess of operating expenses, and have no reasonable present prospect of doing so, the requirement of the RRRA that the railroad exchange its rail properties principally for common stock of Conrail (plus other undefined securities which "in the judgment of [USRA] will minimize any actual or potential debt burden on [Conrail]" (§206(i))) is the legal equivalent of a denial of the railroad's right to terminate service and liquidate its rail properties. Unless there is an independent constitutional basis for sustaining compulsory continuation of rail operations, it is submitted that the compulsory exchange of rail assets for common stock (plus other securities) of Conrail cannot be sustained. This aspect of the case requires a consideration of the current vitality of the *Brooks-Scanlon–Eastern Texas–Bullock* line of cases[77] in the light of this Court's recent decisions relative to the New Haven's inclusion in Penn Central.[78]

This precise issue was raised in a Penn Central context by the United States, *In re Penn Central Transportation Co. (Columbus Option Appeals), supra.* The Court of Appeals for the Third Circuit stated the government's contention as follows:

> "The government, and to a lesser extent the [Penn Central] trustees, urge that the *Brooks-Scanlon–Louisville Joint Stock Land Bank–Third Avenue–Jersey Central* learning is obsolete because in the *Penn-*

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[77] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Railroad Commission v. Eastern Texas Railroad*, 264 U.S. 79 (1924); *Bullock v. Florida ex rel. Railroad Commission*, 254 U.S. 513 (1921).

[78] *Penn Central Merger Cases, supra; New Haven Inclusion Cases, supra.*

Central Merger Cases and *New Haven Inclusion Cases* the Court laid down a new principle of constitutional law. That new principle, they urge, is that secured investors in a railroad enterprise take on obligations in relation to the public which makes it appropriate that they run such risk of erosion of their investment as is necessary in the public interest in order to preserve railroad service." 494 F.2d at 279.[79]

This line of argument by the United States perforce required the Third Circuit to analyze the entire New Haven reorganization as it pertained to the *Penn Central Merger Cases* and *New Haven Inclusion Cases*, 494 F.2d at 279-282.

The Third Circuit concluded as follows:

"The constitutionality of the erosion [of the New Haven Estate] which had taken place prior to the valuation date [December 31, 1966] was never presented to the court in any proceeding in which it could have passed upon that issue. The *New Haven Inclusion Cases* decide no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets.

* * *

"The erosion which took place in the New Haven reorganization did not occur because either the reorganization court or the Supreme Court considered that a new interpretation of the fifth amendment was being announced. Rather the reorganization court acting slowly, but with the concurrence of the bondholders, sought a purchaser which would pay creditors what *Brooks-Scanlon*, *Eastern Texas* and *Third Avenue* required." 494 F. 2d at 282.

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[79]The reference in the quotation to *Third Avenue* is to *In re Third Avenue Transit Corp.*, 198 F.2d 703 (2d Cir. 1952); the reference to *Jersey Central* is to *Central R.R. of New Jersey v. Manufacturers Hanover Trust Co.*, 421 F.2d 604 (3d Cir.), *cert. denied*, 398 U.S. 949 (1970).

Similarly, in the §207(b) proceedings under the RRRA before the Penn Central Reorganization Court, Judge Fullam stated the position of the Governmental Defendants:

> "The government has now argued, for the first time, that there will never be any necessity to impose a deficiency judgment against Conrail, because, as a matter of law, the value of the Debtor's rail assets equals the value of Conrail's Comm on Stock. . . .[I]t is significant that this new valuation argument is necessarily based upon the premise that the government can properly require railroads to operate indefinitely." *Opinion in Support of Order No. 1596, supra* (JA 142-43).

Judge Fullam concluded in his 180-day finding under the RRRA as to this issue:

> "The justification for any such thesis must be found in the public interest of avoiding the widespread dislocations which would result from termination of [Penn Central's] rail service. The issue is not where governmental action may be properly taken to avoid such dislocations, but rather whether the method selected by Congress, the RRRA, is a constitutional method of achieving that legitimate public goal. In short, the question is whether the government can avoid such disruptions by imposing the costs and risks of a possible solution upon [Penn Central's] estate. Support for an affirmative answer to that question is to be found, if at all, in the concept that the privilege of a government-protected railroad monopoly gives rise to a residual claim in the public for continuation of railroad operations, to wit, the notion of 'common carrier responsibility' which finds statutory expression in §1(18) of the Interstate Commerce Act.
>
> "The legitimacy of common carrier responsibility is, of course, not in question, but the duration of that responsibility is. Stated briefly, the issue is whether

the government may treat a common carrier whose government-sponsored monopoly is no longer profitable, as if it remained profitable." *Opinion in Support of Order No. 1596, supra* (JA 143).

In light of the Stipulation as to Factual Matters in the record now before the Court (JA 317-24), there is no question that Penn Central's rail operations are unprofitable. The New Haven Trustee's Motion under §77(g) for dismissal of the §77 proceedings, and the related petition seeking adoption of equity receivership proceedings for liquidation of Penn Central's rail properties (Doc. No. 13 in the Joint Documentary Submission), has been pending since October 9, 1973. The factual basis for the granting of the relief sought by the §77(g) Motion now exists in the findings of fact of the Penn Central Reorganization Court in its *Opinion in Support of Order No. 1543 ("120-Day" Findings under §207(b))* (E.D. Pa. May 2, 1974) (JA 84-103). These factual findings are not challenged by either the Governmental Defendants or the Penn Central Trustees.

Under these circumstances, to require Penn Central to exchange rail assets for common stock and other securities of Conrail is, in terms of its economic impact upon secured creditors and other Penn Central claimants, the practical legal equivalent to mandating continued rail operations of Penn Central in the face of hopeless deficits. As applied to Penn Central, the RRRA is unconstitutional in that it deprives the claimants to the Penn Central estate of their right to withdraw the properties subject to their liens from public service and to sell such properties for their "highest and best use value."

F. Adjudication that the Compulsory Conveyance Provisions of the Present RRRA Are Unconstitutional Can and Should Result in a Congressional Enactment Amending the RRRA to Authorize Payment as Required by the Fifth Amendment for Penn Central's Rail Properties

Congress has correctly concluded that rail operations of Penn Central can no longer be carried out by private enterprise. As above argued, Conrail is not "private enterprise." Whether Conrail is "public" or "private," claimants to the Penn Central estate cannot be constitutionally compelled to accept Conrail securities of dubious, if any, value for the Penn Central rail properties which they own or which are subject to their mortgage liens. The compulsory conveyance provisions of the RRRA are thus in irreconcilable conflict with the Fifth Amendment. The "Tucker Act remedy" does not provide a solution because substantively no cause of action exists which could be asserted in the Court of Claims and, even if one did exist, it would in any event require Congress to appropriate billions of dollars because a taking cannot be paid partly in stock and partly in cash.[80]

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[80]Congress has indicated that it presently has no intention of appropriating billions of dollars, or indeed any amount of money, for this purpose. U.S. Representative Brock Adams, one of the original draftsmen of the RRRA and one of the floor managers of the bill in the House of Representatives and a conferee in the conference between the House and Senate which produced the final version of the RRRA, filed an *amici curiae* brief (in which he was joined by twenty-nine other Congressmen) in the Special Court (No. 74-8), in which he advised that Court as follows:

> "It would seem that some creditors hope and expect that if they can destroy this statute, they will force the government to nationalize the Penn Central. They could then claim additional rights under eminent domain principles which would allow them to base their claims on *cash payment* for *highest and best use*. One of the purposes of this brief by the *amici curiae* is to indicate to the court the *strong resistance* which exists in Congress to paying *any additional amounts of government money* to these estates under any such conditions." *Amici Curiae* Brief, at p. 9 (emphasis added).

If the compulsory conveyance provisions of the RRRA are declared void on constitutional grounds, as sought by the New Haven Trustee in this cross-appeal, there is no valid reason why Congress could not amend the RRRA in the following respect to achieve the public interest objectives of the Act in a manner wholly consistent with the Constitution:

1. It could be provided that Conrail's stock would be subscribed and paid for by USRA using funds borrowed by it from the nation's private capital markets on the strength of the full faith and credit of the United States. The United States would thus assume the risk of gain or loss on the stock of Conrail during the initial period required to ascertain whether or not Conrail can surmount the problems which now beset Penn Central and the smaller railroads which may be included in the Conrail system. If Conrail proves to be a viable, profitable rail system, as contended by the Government in this case, USRA, if it desired, could in a few years turn Conrail over to the private sector by a secondary offering of its stock.[81]

2. It could be provided that Conrail will have available to it the right to take rail properties by eminent domain, and to use cash funds generated by the sale of its stock to USRA to pay just compensation as de-

[81] If the Government's theory that the stock of Conrail has "intrinsic" value is correct, after a few years USRA could make a public offering of some or all of its Conrail common stock. Compare the public sale by the United States of all of the stock of General Aniline and Film Corp. which it became free to sell as part of the settlement of the Interhandel litigation under the Trading with the Enemy Act. If Conrail stock has "intrinsic" value, under the Government theory of this case USRA should be able to recoup 100% of its cost by such public offerings, and thus repay the money lent to it by the United States Treasury or borrowed by USRA from the nation's private capital markets on the strength of the full faith and credit of the United States. If, in fact, the stock of Conrail has a market value less than the amount paid by the United States, under applicable Fifth Amendment principles this loss should be borne by the public via taxation rather than be imposed on private creditor interests.

termined by the federal courts.[82] This power of Conrail could of course be conditioned upon USRA's having approved the properties to be acquired. Possession could pass to Conrail upon its deposit in court of the amount initially determined to be a fair estimate of "just compensation" value, and litigation over valuation issues could take place subsequent to Conrail's taking possession of the designated rail properties. After judgment as to valuation, Conrail would pay the balance due, if any, and receive title to the properties free and clear of all liens.

3. The proceeds generated by the deposits and judgments referred to in Paragraph 2 above could be transmitted to the several reorganization courts, with the divested liens of secured creditors attaching to the proceeds, *cf.* §77(o), and the proceeds administered by the railroad's trustees under escrow arrangements[83] pending completion of a "plan of reorganization" by the ICC (§77(d)) and judicial review as to fairness and equity of the distributive aspects of the plan by the reorganization courts (§77(e)).

4. Pending the completion by USRA of the final system plan for Conrail's cash acquisition of rail properties, Congress could legislate that the Secretary of Transportation would make payments pursuant to §213 in such an amount that railroads subject to the new act would have net railway operating income, after all operating expenses and taxes (but before interest and leased-line rental expense) in an amount equal

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[82]Congress could vest the §209 Special Court with jurisdiction over all proceedings to condemn rail properties for Conrail. This is but one example of how the structure carefully designed by Congress in the RRRA could be adapted in the event the Act is adjudged unconstitutional.

[83]*Cf. In re Penn Central Transportation Co. (Order No. 602)*, 340 F Supp. 851 (E.D. Pa. 1972, implementing *In re Penn Central Transportation Co. (reversal of Orders Nos. 192 and 193)*, 454 F. 2d 9 (3d Cir. 1972).

to a specified return on the rate-making base[81] as fixed by the ICC and judicially approved as "fair and equitable." This decision as to the amount of §213 payments which would constitute just compensation for the interim period would supersede the limitation of $85 million now found in §213.

Penn Central is indeed an "irreplaceable national asset." Its properties constitute a complete transportation system created over more than a century by private enterprise, and should be valued by courts employing the judicial concepts developed for the situation in which the legislature determines that the public interest requires condemnation of the unique and valuable transportation properties owned by a private enterprise which finds itself unable to continue to operate profitably. See *In re of City of New York (Fifth Avenue Coach Lines), supra; In re Port Authority Trans-Hudson Corp., supra.* Under the concepts developed by the Court of Appeals of New York, if Congress legislates that the public interest in continued rail operations requires Penn Central's unique transportation system to be acquired and operated by a publicly controlled authority, Penn Cental's claimants are entitled to have those properties (a) paid for in cash, and (b) valued at an amount which reflects substantially more than mere "scrap" or liquidation value. Valuation of properties is, of course, a judicial matter. Congress'

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[81]Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944):

". . .the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses *but also for the capital costs of the business. These include service on the debt and dividends on the stock.* [citations omitted] By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, *should be sufficient to assure confidence in the financial integrity of the enterprise* so as to maintain its credit and to attract capital." *Id.* at 603 (emphasis added).

work ends when it passes legislation to start the judicial process of eminent domain proceedings, and appropriates the necessary funds.

This case involves the validity of a federal statute which provides for a governmentally controlled and financed corporation to acquire a unique and irreplaceable national transportation asset for consideration other than money or its equitable equivalent. Just compensation is all that the New Haven Trustee seeks from the United States. The early drafts of the RRRA would suggest that Congress might well be prepared to pay "just compensation." However, as finally enacted, the legislation which evolved as the RRRA does not ensure payment of "just compensation." Congress must now be told by the Court that its attempt, no matter how well intentioned, does not satisfy the requirements of the Fifth Amendment. Then the process of amending the RRRA to insure its constitutionality can begin.

III

THE PROCEDURES OF THE RRRA OFFEND PROCEDURAL DUE PROCESS BY MANDATING CONVEYANCE OF RAIL ASSETS PRIOR TO JUDICIAL REVIEW OF THE ADEQUACY OF THE CONSIDERATION PAID WHERE THERE IS NO POSSIBILITY THAT A COURT MAY SET ASIDE THE CONVEYANCES

In refusing on grounds of prematurity to grant so much of the New Haven Trustee's motion for summary judgment as sought an adjudication that the compulsory conveyance provisions of the RRRA are unconstitutional, a majority of the Court below failed to reach the claim that the RRRA deprives creditor claimants of Penn Central of procedural due process.

The RRRA itself clearly provides for no voting by classes of creditors as to whether the Congressionally conceived "plan of reorganization" of Penn Central is in their best interests. Nor does it provide any judicial review as to whether the impact of this plan will accord them fairness and equity in an eventual §77(d) and (e) plan which would necessarily have to follow, rather than precede, conveyance of rail properties to Conrail under §303(b), and valuation of those properties and the securities and common stock of Conrail under §303(c). This aspect of the RRRA calls for the exploration of an issue which was raised but not decided in the New Haven's own §77 proceedings, namely the procedural validity, under the due process clause, of a two-step plan of reorganization, with both voting of creditor claimants and judicial review of the their rights and the distributive provisions of the plan deferred to the second step.[85]

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[85] *In re New York, N.H. & H. R. R.*, 378 F. 2d 635 (2d Cir. 1967). The issue arose in the context of a petition of the New Haven Trustees seek-

(footnote continued on next page)

It was argued by creditors in the New Haven reorganization that such a "two-step plan" would, by itself, violate §77(e) and procedural due process guaranteed by the Fifth Amendment. However, since the New Haven creditors voluntarily decided to support inclusion of the New Haven in Penn Central, and by the time of conveyance a complete plan, including the distributive provisions, had been certified to the New Haven Reorganization Court, the issue was not subsequently squarely raised before either the ICC or the reviewing courts. In any event, it appears that this Court has never before considered a case where a *statute* enacted by Congress made a two-step decision as to reorganization mandatory, and gave dissenting creditors and stockholders no day in court on the issue of whether or not their objections to the first step were reasonably justified in the light of the respective rights and interests of those rejecting it *and all the relevant facts*.[86]

(footnote continued from prior page)

ing authority of the reorganization court to expend money of the estate for the purpose of presenting Step I of a plan (inclusion in Penn Central by sale of assets) to the ICC. Judge Friendly ruled that the expenditure could be approved whether or not a two-step plan was valid under §77(e); however he indicated that he considered a two-step plan with voting deferred of doubtful validity:

> "A complete plan would permit a vote to be taken, surely a desirable thing even if, *as we rather doubt*, the Trustees are right in saying that it is not requisite. . . ." *Id.*, at 640 (emphasis added).

[86]The text of the "cram down" clause of §77(e) reads in pertinent part:

> "*Provided*, that, if the plan has not been so accepted by the creditors [after vote] and stockholders [after vote if they have an equity], the judge may nevertheless confirm the plan if he is satisfied and finds, *after hearing*, that it makes adequate provision for fair and equitable treatment for the interests or claims of those [creditors and stockholders who voted] rejecting it; *that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts*; and that the plan conforms to the requirements of Clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)." (Emphasis added).

The RRRA is deficient precisely in providing no judicial proceedings in which a court determines "that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." *Denver & Rio Grande, supra,* stands only for the proposition that §77(e) affords procedural due process.

As Judge Fullam noted in his concurring opinion below:

> ". . .at least until now, a decision that a stock distribution was fair and equitable has always required *contemporaneous* comparisons between the value of the creditors' and stockholders' claims and the value of the stock, a weighing of entrepreneurial risks against the prospects for growth. And merely because it is constitutionally permissible for a reorganization court to authorize sales of assets free and clear of liens, it does not follow that such sales may be approved without knowledge of the purchase price, and without a simultaneous transfer of existing liens to proceeds having value equivalent to the assets conveyed. And, of course, the magnitude of the public interest in continued rail service cannot justify treating these rail properties as if they were already public property." (JA 78-79; emphasis added).

Judge Fullam observed that the §207(b) judicial proceedings come at a time when the court simply lacks the factual basis for making findings analogous to §77(e) determinations:

> "Under the provisions of the Act, the only judicial determinations which can have a significant effect in protecting the rights of the railroad estates and their creditors must be made at a time when substantially all of the information pertinent to those judicial decisions is unknown and unknowable." *Opinion in Support of Order No. 1596, supra* (JA 150-51).

In this cross-appeal from the district court's partial denial of the New Haven Trustee's summary judgment motion, the issue is *not* whether the creditors and stockholders who attack the constitutionality of the RRRA are being "reasonable" in rejecting the RRRA, nor even whether a truly viable alternative exists under which the rights of creditors and stockholders will demonstrably be better protected. The issue is that the RRRA does not allow any court possessed of the requisite factual record on which it could make §77(e) cramdown findings to hold a hearing and decide whether or not Penn Central's properties should or should not be conveyed to Conrail. In what appears to be almost a parody of §77(e), §303(c) provides for the Special Court to make "fair and equitable" findings on the basis of an evidentiary record *after* the Penn Central's rail properties have been conveyed to Conrail. But if the Special Court finds at that stage that "fair and equitable" findings can not be made, it will be without jurisdiction to enforce that finding by any kind of meaningful judicial decree. At that stage, neither this Court, nor the Penn Central Reorganization Court, nor the Special Court could remedy the Congressional disregard of the procedural due process rights of creditors and stockholders.

As Judge Fullam observed in his *Opinion in Support of Order No. 1596*:

> "But the Final System Plan also represents a preliminary determination of the values of the properties to be conveyed, and of the values attributable to the consideration to be paid. Under normal concepts of due process in the administrative field, one would expect to find some opportunity for obtaining and considering the views of the affected property owners in advance of such value determinations." *Opinion in Support of Order No. 1596, supra* (JA 135).

Although Judge Fullam suggested that this problem might be mitigated in its procedural due process aspects by the Special Court giving less or no weight to USRA's initial value determinations, he found that:

> "A more serious, or at least more noticeable, problem stems from the fact that the conveyance and transfers pursuant to the Final System Plan are mandated to occur in advance of any judicial scrutiny and in the absence of any judicial determination as to the fairness and equity of the proposed exchanges. Arguably, even this defect might be remedied if the Special Court were empowered to set aside the conveyances if it should find unfairness or inequity. *But it is clear that the Act does not permit any such curative action by the Special Court.*" *Opinion in Support of Order No. 1596, supra* (JA 136; emphasis added).

In an attempt to avoid a holding that the RRRA offends procedural due process, the United States and USRA have now recommended to the Special Court that it "construe" the following language of §303(b)(1) of the RRRA:

> "(b) CONVEYANCE OF RAIL PROPERTIES.—(1) The special court *shall*, within 10 days after the deposit under subsection (a) of this section of the securities of the Corporation...order the trustee or trustees of each railroad in reorganization in the region *to convey forthwith* to the Corporation. . . ." (emphasis added)

as if the word "shall" read "may," and the words "to convey forthwith" read "to convey after completing a judicial determination of fairness and equity."[87]

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[87] Brief of Appellants United States, USRA and the ICC in appeals from Order No. 1596, Special Court (No. 74-8), p. 124:

> "If this [Special] Court concludes that the Tucker Act has been repealed *pro tanto*, we submit that it should read Section 303(b) in a manner that will save its constitutionality. . . . The Court can accomplish that by interpreting section 303(b) to permit the Court to decline to order the transfers. . . ."

Such a construction of the RRRA would amount to a bald judicial rewrite. Congress has legislated that the Special Court must order the conveyances within 10 days after receipt of the consideration (§303(a)) called for by a final system plan which has been certified to it (§209(c)) after approval by Congress (§208). While the Special Court would be bound by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to refuse to carry out a congressional directive that offends the Fifth Amendment rights of creditor claimants, that does not warrant a judicial rewrite of §303(b)(1). Rather, it constitutes an acknowledgement by the Governmental Defendants that §303(b)(1) is facially defective under the due process clause, at least in the absence of any Tucker Act remedy. The New Haven Trustee's motion for summary judgment, seeking to enjoin enforcement of the compulsory conveyance provisions of the RRRA on that ground, should have been granted.

IV

TO THE EXTENT THAT THE RRRA AMENDS THE SUBSTANTIVE AND PROCEDURAL PROVISIONS OF §77 OF THE BANKRUPTCY ACT, THE RRRA IS A "LAW ON THE SUBJECT OF BANKRUPTCIES" AND IS VOID FOR WANT OF GEOGRAPHICAL UNIFORMITY

A. The RRRA Is an Invalid Non-Uniform Statute as Applied to Penn Central, and Creditors of Penn Central Have Standing to Challenge the Lack of Geographical Uniformity

The RRRA provides, in §§206(c) and 206(d), for a "final system plan" which shall designate which rail properties of railroads in reorganization *in the region* shall be transferred to Conrail or other transferees specified in §206(c) for the consideration specified in §206(d). The term "region" is defined in §102(13) of the RRRA to mean seventeen designated States, the District of Columbia, and "portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the Commission by order)." The provisions of the RRRA do not apply to railroads which have filed, or may hereafter file, petitions for reorganization if such railroads do business primarily in the thirty-three State area not covered by the definition of "region".[88]

The RRRA purports at the same time to override inconsistent provisions of the Bankruptcy Act (§601

[88]The RRRA also apparently does not apply to any railroad *within* the geographic region of the 17 states which files a petition for reorganization under §77 *after* July 1, 1974, the last day upon which the "180-day" findings mandated by §207(b) can be made. While there does not appear to be any such railroad now, such a situation may arise during the course of proceedings under the RRRA.

(b)), and in various sections purports to characterize the processes of the RRRA as a form of "reorganization." Thus, for example, §207(b) provides in its third sentence:

> ". . .each such court shall order that the reorganization be proceeded with pursuant to this Act unless. . ."

The fourth sentence of §207(b) provides:

> "If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act."

The clearest indication that the RRRA purports to be a law "on the subject of bankruptcies" appears in §209(b), wherein it is provided:

> "The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court."

The powers of a reorganization court under §77 of the Bankruptcy Act are, therefore, subsumed in the powers of the Special Court. Accordingly, if the RRRA is to be sustained constitutionally, it must be on the basis that Congress was exercising the power vested in it by Art. I, Sec. 8, Cl. 4:

> "To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States."

This provision precludes Congress from passing a law on the subject of bankruptcies applicable to any geographic area which is less than the entire United States. This Court has stated:

> "The laws passed on the subject [of bankruptcies] must, however, be uniform throughout the United States, but that uniformity is geographical. . ."

Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902).

A majority of the court below (Judges Fullam and Bechtle) ruled that the RRRA, insofar as it purports to be a law on the subject of bankruptcies, is void on its face for violation of the geographical uniformity requirement of Art. I, Sec. 8, Cl. 4 of the Constitution.

Judge Fullam, after citing the *Hanover Bank* case, and Justice Frankfurter's observation that the uniformity requirement

> ". . .is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country, regardless of the state in which the bankruptcy court sits."[89]

reasoned that the geographical uniformity required by Art. I., Sec. 8, Cl. 4 requires bankruptcy legislation to apply uniformly to debtors engaged in the same business throughout the United States.

Indeed, the United States and the other governmental defendants do not seriously contend that the RRRA meets the uniformity requirement; rather, they rely primarily on the contention that creditors of a railroad do not have standing to question the application of an admittedly non-uniform statute to them. The Government urges that only railroads outside the region have standing to assert that they are being deprived of the *benefits* of the RRRA.[90]

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[89] *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 172 (1946).

[90] Judge Aldisert, dissenting on this point, reasoned that the plaintiffs lacked standing under the rule of *United States v. Raines*, 362 U.S. 17, 21 (1960) that "one to whom application of the statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." With all due respect, Judge Aldisert seems to have misunderstood the argument of the plaintiffs below.

Judge Fullam (joined by Judge Bechtle) answered this contention as follows:

> "I cannot accept the notion that only those debtors not affected by the statute can have standing to challenge the lack of geographical uniformity. In my view, every railroad subject to the statute has standing to make that challenge, and so do creditors of such railroads. The Penn Central interests are not complaining that the Act is validly applied to others and not to Penn Central; the contention is that an invalid, non-uniform statute is being applied to Penn Central.
>
> "Neither do I accept the government defendants' argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute." (JA 62-63).

Judge Fullam's analysis of the standing issue is correct as to all aspects of the RRRA that constitute an exercise of Congress' Bankruptcy Clause powers.[91] We now turn to the issue of which of the RRRA's provisions depend on Congress' Bankruptcy Clause powers.

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[91] It is not contended that the provisions of the RRRA providing, for example, for governmental financial assistance (*e.g.*, §§210, 213 and 215; Title IV; Title V) are anything except an exercise of Congress' Commerce Clause powers combined with its powers to appropriate money for the common good. The New Haven Trustee does not argue that railroads outside the region are being unfairly discriminated against if they are denied access to governmental financial assistance.

B. The Court Below Was in Error in Concluding that the RRRA's Defect as Non-Uniform Legislation on the Subject of Bankruptcies Taints Only the Provision Requiring Mandatory Dismissal of §77 Proceedings

A majority of the court below, having found that the RRRA is invalid, non-uniform legislation on the subject of bankruptcies and that plaintiffs had standing to assert that constitutional defect, erred by limiting the scope of the court's holding to a single clause of a subsection of the RRRA, namely the provision requiring mandatory dismissal of §77 proceedings.[92]

The New Haven Trustee agrees with Judge Fullam that the hallmark of an exercise of Bankruptcy Clause powers is that the law "impairs the obligation of contracts." However, the RRRA's compulsory conveyance provisions (§§206, 207, 208, 209(c) and (d) and 303(b)) are constitutionally void when viewed as an exercise of Commerce Clause/eminent domain powers.[9] Therefore, if constitutional at all, these provisions must represent an exercise of the Bankruptcy Clause power.

Judge Fullam, however, reasoned that since various provisions of the RRRA considered separately have counterparts in §77, and since §77 is uniform throughout the country, it does not matter that the RRRA provisions do not apply uniformly. This reasoning, with all due respect, misses the essential point: the RRRA's provisions have combined elements found in §77 in new and different ways, and have at the same time removed safeguards that heretofore restrained the use of powers vested in bankruptcy courts by §77, and thereby maintained an approximate balance between "public interest" considerations and the property rights of secured creditors.

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[92]RRRA, §207(b), third sentence, Clause(2).

[93]See Part II-B of this Brief.

A statute must be analyzed in terms of its total effect, not just whether it is made up of elements found in another statute whose constitutionality is unchallenged.

Thus, while it is true that

> "Authority to order conveyances free and clear of liens. . . already exists under §77, and is not newly created or added by the 1973 Act" (JA 63-64),

a careful comparison of the provisions in each statute reveals these differences:

1. In §77, the "free and clear" conveyance authority, which is provided in §77(o) and in the plan provisions, §77(d), (e), and §77(b)(5), is subject to the following safeguards:

(a) A §77(o) conveyance must be a "sale," which is "in the interest of the debtor's estate and ultimate reorganization" and, most important of all, it must be determined by the railroad's trustees (charged with the fiduciary duties of the common law towards their beneficiaries) that such sale is in the interest of the debtor's estate and ultimate reorganization. Moreover, in a §77(o) transaction, the liens on the properties are transferred to the proceeds.

(b) A conveyance under a §77(d) plan containing §77(b)(5) provisions must be at a price "not less than a fair upset price" (the term is a phrase of art derived from equity receivership practice), and before the plan can be consummated it must be approved by a judge as being "fair and equitable" (another phrase derived from equity receivership practice). To be "fair and equitable," a sale under a plan must, in a conventional earnings-based reorganization, be based on an accurate appraisal of the value of the properties comprising the business as a going concern (*Consolidated*

Rock Products v. DuBois, supra; Ecker v. Western Pac. R.R., supra; Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R., supra). When §77(b)(5) is resorted to in a context where no earnings-based reorganization is possible, to be "fair and equitable" the plan must be based on an accurate appraisal of the properties being sold from the standpoint of their "highest and best value" (*New Haven Inclusion Cases*), and, to the extent that the consideration takes the form of common stock, there must be assurance by other provisions in the plan that in fact the common stock will have value equal to the monetary equivalent of the assets conveyed (*id.*).

2. In the RRR[illegible], the authority to order conveyances free and clear of liens is set forth in §§303(b)(1) and (2), but the following safeguards are absent:

(a) Viewed by analogy to §77(o), there is no requirement that the railroad's trustees must have determined that the sale is in the best interests of the estate and of ultimate reorganization.[94] Moreover, the safeguard that the liens divested from the property attach to the proceeds is absent in §303(b)(2) of the RRRA.

(b) Viewed by analogy to a §§77(d) and (e) plan containing §77(b)(5) provisions, the safeguard of "fair upset price" and a prior judicial determination, based on valuation evidence, that the plan is "fair and equitable" is absent from §303(b) of the RRRA. While

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[94]The Penn Central Trustees have, in fact, determined that it would *not* be in the best interest of the estate to convey properties under the RRRA to Conrail for the consideration prescribed by the final system plan *unless* this Court makes a definitive determination that there is a "Tucker Act remedy" for the Trustees to sue the United States in the Court of Claims. See Trustees' Report dated April 3, 1974 (Doc. No. 10 in the Joint Documentary Submission).

there is a requirement of a "fair and equitable" determination in §207(b), third sentence, clause (2), it is not possible at the time of the §207(b) determination for the court or parties to know what the "plan" is or the value of the properties or the nature, amount or value of the securities to be issued for such properties; indeed the United States insisted that *no* valuation evidence should have been considered by the Penn Central Reorganization Court in connection with the 180-day decision under §207(b). Obviously, a *post facto* determination of "fair and equitable" under §303(c), whatever its status under the due process clause of the Fifth Amendment (see Part III of this Brief), is not the same thing as a "fair and equitable" determination as to a reorganization plan prior to the conveyance.

Thus, it cannot be said that the RRRA, considered in its total impact,

> "adds *nothing*, in that respect, to the powers already granted to reorganization courts under the geographically uniform and admittedly valid provisions of §77 of the Bankruptcy Act." (JA 63; emphasis added).

It is reasonably certain that the RRRA adds *something* to the ways in which contracts of secured creditors of railroads can be impaired. Indeed, it is reasonably obvious that if Congress had intended to add *nothing* to the powers which reorganization courts now have under §77 of the Bankruptcy Act, then no amendment of §77 would have been required. If Congress had intended merely to create USRA as a planning and financing agency, and Conrail as a corporation which would receive governmental financial aid in order to acquire rail properties under §77(o) or §77(b)(5), all that would have been necessary would have been for Congress to pass a law containing the

following portions of the RRRA: Title I; Title II, §§201 to 205, §§210 to 215; Title III, §§301 and 302; Title IV; Title V; Title VI.

These portions contain the provisions of the RRRA that can be implemented without amending §77 or otherwise impairing contracts in ways not heretofore authorized by §77. The balance of the RRRA should be declared void as a non-uniform law on the subject of bankruptcies.

CONCLUSION

The New Haven Trustee agrees with those portions of the Order dated June 25, 1974:

> which enjoin defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA;
>
> which enjoin defendants from taking any action to enforce §304(f) of the RRRA; and
>
> which adjudicated that §303, §304(f) and a portion of §207(b) are unconstitutional.

The New Haven Trustee, however, urges that for the reasons hereinabove set forth, the Order below should be reversed and remanded for entry of an order:

(a) Enjoining defendant USRA, Secretary of Transportation Brinegar, and the ICC[98] from taking any action to implement or enforce the following sections of the RRRA:

> §206, subsections (c), (d), (f) and (i);

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[98]In accordance with 28 USC §2322, the United States has been named as a party defendant in *Smith v. United States* insofar as this action seeks to set aside one or more orders of the ICC under the purported authority of the RRRA.

§207, in its entirety;

§208, in its entirety;

§209(c) and (d);

§302(a);

§303(b) and (c);

§304, to the extent that it purports to amend the laws applicable to abandonments and discontinuances of railroad service by railroad reorganization under §77 pursuant to §77(o) or otherwise, and by railroads operating under equity receiverships pursuant to §77(i) following dismissal of reorganization proceedings pursuant to §77(g).

(b) Adjudging the above enumerated portions of the RRRA null and void as violative of the Fifth Amendment of the United States Constitution to the extent that such portions would require railroads in reorganization or in equity receivership to convey their rail properties or designated portions thereof to Conrail in exchange for its securities and common stock, obligations of USRA, and "other benefits" referred to in the RRRA; and to the extent that such portions fail to provide compensation for interim erosion of the estates of railroads in reorganization by virtue of deficits from rail operations required by statute irrespective of the lack of any prospect for an earnings-based reorganization under §77 of the Bankruptcy Act.

(c) Adjudging that the above-enumerated portions of the RRRA are null and void as a law on the subject of bankruptcies because the RRRA is not geographically uniform throughout the United States, in violation of Article I, Section 8, Clause 4 of the Constitution of the United States, and enjoining enforcement thereof on that ground insofar as such

portions amend applicable provisions of §77 of the Bankruptcy Act.

(d) Adjudging that the motion of the New Haven Trustee for partial summary judgment is granted in full.

(e) Adjudging that defendants' motions for summary judgment are denied.

(f) In the event that the Special Court, Regional Rail Reorganization Act, shall have entered any order pursuant to its consideration of the appeals from Order No. 1596 of the Penn Central Reorganization Court under §207(b) of the RRRA deciding that Penn Central shall be reorganized by means of transferring some of its properties to Conrail, directing the Governmental Defendants and the Penn Central Trustees to petition said Special Court for appropriate modification of its order in the light of this Court's opinion.

August 28, 1974

Respectfully submitted,

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APPENDIX TO CROSS-APPELLANT'S BRIEF

In accordance with Rule 40(c) of the Revised Rules of the Supreme Court of the United States, there is set forth below the text of pertinent provisions of the Constitution of the United States and Statutes involved in this case, in addition to the text of the Regional Rail Reorganization Act of 1973, which is set forth at JA 391 *et seq.*

CONSTITUTION OF THE UNITED STATES

Article I, Section 8, Clauses 3 and 4:

"Section 8. The Congress shall have Power

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

"To establish. . .uniform Laws on the subject of Bankruptcies throughout the United States;"

Article I, Section 9, Clause 7:

"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; . . ."

Amendment V

"No person. . .shall be. . .deprived of. . .property, without due process or law; nor shall private property be taken for public use, without just compensation."

STATUTES OF THE UNITED STATES

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

"Section 77. Reorganization of Railroads Engaged in Interstate Commerce.—(a) Any railroad cor-

poration may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization.

* * *

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor

with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section."

• • •

"(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the

consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment,

and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such

class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, is a creditor or stockholder, the interests of claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-

thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e). *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion,

with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon

confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case."

* * *

"(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the pro-

ceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

• • •

"(i)...upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this section and for the payment of administrative expenses and allowances in the proceeding hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided."

• • •

"(j) In addition to the provisions of Section 11 of this Act for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree:. . ."

• • •

"(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of rail-

road and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage."

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In the Supreme Court of the United States

OCTOBER TERM, 1974

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE FEDERAL APPELLEES

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UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE FEDERAL APPELLEES[1]

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[2] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. The notice of appeal (J. App. 385) was filed on July 3, 1974, and

[1] This brief is submitted on behalf of all federal parties other than the United States Railway Association, a federally-established nonprofit corporation, which is represented by separate counsel.

[2] "J. App." refers to the Joint Appendix lodged in this Court.

the jurisdictional statement was filed on August 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[3]

QUESTIONS PRESENTED

1. Whether appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is ripe for adjudication.

2. Whether the creditors of the debtor railroads or the railroads themselves are constitutionally entitled to receive cash under the Rail Act.

3. Whether the absence of any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties renders the Rail Act invalid.

4. Whether the Rail Act is invalid as a geographically nonuniform law on the subject of bankruptcies.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 8, cls. 3 and 4 of the Constitution in pertinent part provides:

> The Congress shall have Power * * *
>
> * * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

The Fifth Amendment to the Constitution in pertinent part provides:

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[3] By stipulation of counsel for the parties, and in the interest of expeditious consideration of the merits of this case, we are lodging this brief in advance of the noting of probable jurisdiction, which we do not oppose.

> No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 207, 208, 209, and 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, 998–1000, 1005–1008, in pertinent part provide:[4]

> Section 207(b) Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be

[4] The Rail Act in its entirety is set forth at J. App. 393–431.

proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *

(c) Within 420 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. * * * The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan * * * * * *

Section 208(a) The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such

period stating that it does not favor the final system plan.

(b) If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section. * * *

Section 209(a) Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section

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with the least delay and the greatest possible fairness and ability. * * *

(e) Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest. * * *

Section 303(a) Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(e) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b)(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan

as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease

under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(c)(1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and the other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or

controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan,

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the trans-

fer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail

properties to the Corporation and the respective profitable railroads under such subsection.

(d) A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

STATEMENT

The facts are set forth at pages 6–13 of the United States' brief as appellant in *United States of America*,

et al. v. *Connecticut General Insurance Corp., et al.*, No. 74–168.[2]

SUMMARY OF ARGUMENT

I

Appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is not ripe for adjudication. The harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and uncertainties attending the operation of the Act make it impossible to evaluate his claim of future injury. Mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the Penn Central's rail properties unavailable for inclusion in the final system plan, formulation of a final system plan including those properties, and congressional approval of such a plan. Furthermore, there is at present no factual basis for evaluating appellant's contention. The following critical facts are not yet knowable: (1) the rail properties to be transferred under the final system plan; (2) the value of those properties; (3) the value of the consideration to be received in return; (4) whether the claims of secured creditors will be paid in full; (5) the form of the consideration to be paid to secured creditors.

[2] The government's appeal in No. 74–168 is from a judgment of the United States District Court for the Eastern District of Pennsylvania in three consolidated civil actions (Nos. 74–189, 74–1107 and 74–1149). Appellant Smith was the plaintiff in No. 74–1107 in the district court and is before this Court as an appellee in No. 74–168.

Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue may be litigated under the Tucker Act in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would in any event be able to raise his claims in the special court following congressional approval of the plan.

II

Neither the creditors of the debtor railroads nor the railroads themselves are constitutionally entitled to receive cash under the Rail Act. The Act provides for the integrated reorganization of an entire regional railroad system through an effective merger of bankrupt railroads into the Consolidated Rail Corporation; as such it operates as a reorganization statute under which creditors have no constitutional right to payment of their claims in cash.

Although the federal government may temporarily participate in the management of the Corporation, that participation will not transform the Corporation into a governmental enterprise. Thus the transfer of rail properties to the Corporation clearly effects only a merger, not a taking by a federal instrumentality.

Nor does the mandatory nature of the merger take the Rail Act out of the constitutional ambit of reorganization legislation. It is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad

without securing the consent of its owners and creditors.

But even if the Rail Act operates as a condemnation statute, as appellant contends, the Corporation is not constitutionally required to pay cash in exchange for the debtor railroads' rail properties. Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in exchange for indirect ownership of and claims against those same properties, and that continued interest in the rail properties themselves is the full and perfect equivalent for the property taken.

III

After the completion of the proceedings under the Rail Act, the estates of the debtor railroads will be entitled to recover any constitutional deficiency under the Tucker Act in the Court of Claims. Due process therefore does not require a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties. If such a determination is required, however, it may be secured from the special court.

IV

The Rail Act is not invalid as a geographically nonuniform law on the subject of bankruptcies. The Act applies uniformly to all reorganizations of operating railroads, and the fact that those reorganizations happen to be located in the northeastern section of

the nation does not violate the requirement of geographical uniformity. Moreover, that requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination. The Act may in any event be sustained as a proper exercise of commerce power.

ARGUMENT

I

APPELLANT'S CLAIM THAT THE RAIL ACT WILL EFFECT A TAKING OF HIS TRUST PROPERTY WITHOUT JUST COMPENSATION IS NOT RIPE FOR ADJUDICATION

Appellant is the trustee of the estate of the New York, New Haven and Hartford Railroad Company, which is a secured creditor of the Penn Central Transportation Company.[6] His principal argument in this litigation is that any transfer of the Penn Central's rail properties in exchange for stock and securities of the Consolidated Rail Corporation, obligations of the United States Railway Association, and other property pursuant to Section 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 1005–1008, will effect a taking of his trust property for public use without just compensation. Appellant bases this argument upon two separate contentions: that the value of the consideration received by the Penn Central estate will as a factual matter prove to

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[6] The New Haven estate holds secured mortgage bonds in the amount of $34,025,800 and also possesses an equitable lien which appellant asserts (Br. 24, n. 21) is equivalent to a secured claim.

be constitutionally insufficient in amount (Br. 61–83); and that payment of the consideration in stock and securities violates the New Haven estate's alleged constitutional right to have their claims satisfied in cash (Br. 52–60, 84–87). The district court concluded that these contentions were not ripe for adjudication, and we agree.

The doctrine of "ripeness" is principally a flexible rule of judicial discretion and convenience. It is of course true that litigants occasionally raise issues that are so premature and speculative that they present no actual case or controversy within the Article III jurisdiction of the federal courts. See, *e.g.*, *Roe* v. *Wade*, 410 U.S. 113, 127–129. But more commonly prematurity is a merely discretionary nonconstitutional ground for avoiding "passing on questions of public law * * * that are not immediately pressing." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432. Ripeness is relied upon as a decisional ground perhaps most frequently in constitutional litigation, for "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (concurring opinion of Justice Brandeis). See also, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 154–155 (concurring opinion of Justice Frankfurter). Thus this Court has often dismissed suits raising constitutional claims that could equally well be asserted at a later point without undue prejudice to the particular plaintiffs. See, *e.g.*, *Golden* v. *Zwickler*, 394 U.S. 103; *Communist Party* v. *Sub-*

versive Activities Control Board, 367 U.S. 1; *United Public Workers* v. *Mitchell*, 330 U.S. 75.

Appellant's claim of an uncompensated taking does not appear to present even that minimal concreteness required of a case or controversy under Article III.[7] But certainly appellant has failed to meet the standard of greater concreteness required for the exercise of discretionary federal declaratory judgment jurisdiction. See, *e.g.*, *Poe* v. *Ullman*, 367 U.S. 497. As we now show, it is presently both inappropriate and unnecessary to consider appellant's claim of an uncompensated taking in view of (1) the manifold uncertainties that still attend the future operation of the Rail Act with respect to the Penn Central and its secured creditors and (2) the availability of later and better opportunities for review of the questions appellant raises here.

1. Appellant's suit on behalf of the New Haven estate proceeds from a concern that a forced conveyance of the Penn Central's rail properties will result in injury to the Penn Central's creditors. But several contingencies and uncertainties render that concern purely speculative and make it impossible to give meaningful consideration to appellant's claims. Appellant is unable to show either that the Penn Cen-

[7] Certainly appellant's claim is presented in a more abstract manner than that of the plaintiff in *Epperson* v. *Arkansas*, 393 U.S. 97, upon which he relies. The plaintiff in *Epperson* was a schoolteacher compelled by her school district to teach the principles of biological evolution, in violation of the state statute which she challenged (393 U.S. at 100). In contrast, as we discuss further below (pp. 19–20, *infra*), it is not now known whether the conveyance provisions of the Rail Act will ever be applicable to the Penn Central.

tral's rail properties will be transferred pursuant to the Rail Act or that the terms of any such transfer would be unfair.

It has not yet been judicially determined that those rail properties will be available for inclusion in the final system plan. To the contrary, the reorganization court has determined, in the language of Section 207 (b) of the Rail Act, that the Penn Central shall not "be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." *In the Matter of Penn Central Transportation Co.*, E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974. The government disagrees with that determination and has taken an appeal to the special three-judge court established under Section 209(b) of the Act. But it was obviously appropriate for the district court below to refuse to consider appellant's constitutional challenge while he was successfully litigating elsewhere to remove the Penn Central in its entirety from the operation of the Act.

Moreover, even if the special court on review holds that the Penn Central's rail properties will be available for inclusion in the final system plan, it will not be known whether those rail properties will be subject to mandatory conveyance until such a plan is formulated pursuant to Section 206 of this Act.* The parties have stipulated only that inclusion of some Penn Central rail properties in the final system plan is "likely". J. App. 318–319.

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* A bill (S. 4003) has been introduced to extend by 120 days the deadline for submitting the final system plan to Congress. See 120 Cong. Rec. S16619 (daily ed., September 16, 1974).

Furthermore, once the final system plan is formulated it must be submitted for review by Congress pursuant to Section 208 of the Act, and under the terms of that provision either house may by majority vote reject the plan so submitted and require the formulation of a new plan.[9] Thus mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the rail properties unavailable for inclusion in the final system plan, formulation of a plan including those properties, and congressional approval of that plan.

But even assuming that some of Penn Central's rail properties are transferred to the Corporation under an effective final system plan, there is no factual basis for evaluating appellant's contention that such a transfer would result in an uncompensated taking of his trust property. Indeed, there is at present no basis for assuming even that the Penn Central estate itself, let alone its secured creditors, would be injured by such a transfer. The parties have stipulated (J. App. 319):

> It will not be possible to ascertain until completion of the planning and approval process required by the Act
>
> (i) which rail properties of Penn Central will be designated for transfer or conveyance * * *;

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[9] Whether such a one-house veto is constitutional is not wholly free of doubt. See our supplemental brief in *Train* v. *City of New York*, No. 73-1377, and *Train* v. *Campaign Clean Water, Inc.*, No. 73-1378.

> (ii) the liquidation value of properties designated in the final system plan for transfer * * *; * * * or
>
> (iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer * * *.

Moreover, appellant makes his claim only on behalf of a secured creditor of the Penn Central estate. See note 6, supra. A constitutional inadequacy in the consideration paid to Penn Central might not affect creditors at all. As we indicated in our opening brief in No. 74–168 (pp. 30–31, 70–72), it appears that the Penn Central estate will be sufficient to cover all valid claims of creditors. Certainly there is no basis for assuming that priority claimants, such as the New Haven estate, will receive less than full satisfaction.

Until at least some of these uncertainties are resolved, no court will be able to pass intelligently on appellant's claim that the Rail Act will effect an uncompensated taking of his property. Nor is there any reason to consider at this time appellant's contention that secured creditors of the Penn Central estate are entitled to payment of their claims in cash. Although Penn Central will not receive cash in exchange for the rail properties it transfers to the Corporation, secured creditors of the Penn Central may receive cash or its equivalent. Cash in substantial amounts may be available, because the Rail Act contemplates that some of the debtor railroads' rail properties may be sold to profitable railroads or state and local governments, or may be abandoned and sold for scrap. See Sections 206(e)(1)(B), 303(e)(1)(A)(ii), 304(a), (b), and

(e)(2)(C), and 403(a). Consideration for the rail properties to be transferred to the Corporation will be payable in part in federally guaranteed debt instruments of the Association (see Sections 206(d), 210(b), and 303(e)(2)(B)) and possibly also of the Corporation (see Section 206(i)). Accordingly, it is possible that priority claimants would be awarded payment in cash and readily salable debt instruments essentially equivalent to cash.

In short, the harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and the uncertainties attending the operation of that Act make it impossible to evaluate his claim of future injury. Appellant does not seriously dispute this. Instead, he rests his plea for immediate judicial attention on the contention that "a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist" (Br. 25). We now turn to a discussion of that contention.

2. Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue, as we have already shown in our opening brief in No. 74–168 (pp. 39–48), may be litigated in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would be able to raise his constitutional claims in the special court established under Section 209(b) of the Act following congressional approval of the plan.

Appellant contends that such relief is barred by Section 303(b)(2) of the Rail Act, which provides that the conveyance of rail properties pursuant to the final system plan "shall not be restrained or enjoined by any court."[10] But as the court below evidently recognized (J. App. 53, 82), that provision does not by its terms bar an injunction against the certification of a final system plan pursuant to Section 209(c) of the Act. Nor would it appear to bar an injunction prohibiting the corporation from depositing its securities with the special court pursuant to Section 303(a). Thus the special court, if necessary, would have adequate power to protect prospectively against an uncompensated taking.

Many of the uncertainties that make it infeasible to review appellant's constitutional contentions in the instant litigation will be resolved by the time the Association submits the final system plan to Congress for its review. Since it will at that time be known which of Penn Central's rail properties will be transferred to the Corporation and for what consideration, it may then be possible, as it is not now, to make a reasonably accurate determination of whether an uncompensated taking will occur and, if so, whether

[10] Appellant also suggests (Br. 26) that a future decision by the special court on the question whether the process under the Rail Act satisfies the statutory standard of fairness and equity may be *res judicata* on the constitutional question he seeks to raise here. But it is clear that although the judgment of the special court may collaterally estop the parties from relitigating factual issues, it would not bar the future litigation of different legal issues. See A.L.I., *Restatement of the Law of Judgments*, §§ 68, 70 (1942).

the New Haven estate will on that account receive less than the face value of its claims.

3. If this Court concludes that the Tucker Act will not afford an adequate remedy for uncompensated takings under the Rail Act, and also determines that the question of the quantitative sufficiency of the consideration to be paid to the Penn Central estate is ripe for adjudication, the Court should remand to the district court for the taking of evidence. That question cannot be decided on the present record, which is, for the reasons discussed above (pp. 20–22, *supra*), necessarily silent as to many pertinent facts."

On the other hand, appellant's contention that Penn Central's secured creditors are constitutionally entitled to receive payment of their claims in cash rather than securities and other property poses a purely legal question which, if ripe, this Court would be able to decide without requiring the district court to take any further evidence. We therefore now turn to a discussion of the merits of that contention.

II

NEITHER THE CREDITORS OF THE DEBTOR RAILROADS NOR THE RAILROADS THEMSELVES ARE CONSTITUTIONALLY ENTITLED TO RECEIVE CASH UNDER THE RAIL ACT

Appellant contends (Br. 52–60, 84–87) that Section 303 of the Rail Act, which provides for payment of

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[11] Appellant's related argument that the Penn Central will be entitled to the "highest and best use" value of its rail properties (Br. 77–83) is purely abstract and does not furnish a reason for invalidating the Rail Act. Decision on that question should therefore also be reserved at least until the rail properties to be transferred under the Rail Act have been identified.

stock, securities, and other property in exchange for the rail properties of the debtor railroads, violates the constitutional right of the New Haven estate, as a creditor of one of the debtor railroads, to receive payment of its claim in cash. The short answer to that contention is that the form of the payment made to a debtor railroad does not interfere with any alleged right of its creditors to receive payment of their claims in cash; if the creditors are, as appellant contends, entitled to payment in cash, the reorganization courts can sell the stock, securities, and other property received by the debtor railroads and distribute the cash proceeds. Appellant should address his claim for cash to the reorganization court after the proceedings under the Rail Act have terminated; that claim is not a basis for enjoining enforcement of the Act.

Appellant in fact is attempting to assert on behalf of the debtor railroads an alleged right to receive cash in exchange for their rail properties—a right which the estates of those railroads do not here claim. For the reason stated in the preceding paragraph, we believe appellant lacks standing to advance that claim. But we now show both that the Rail Act operates as a reorganization statute under which creditors are not constitutionally entitled to payment of their claims in cash and that the debtor railroads would not be entitled to receive cash for their rail properties even under a condemnation statute.

A. THE RAIL ACT OPERATES AS A REORGANIZATION STATUTE UNDER WHICH CREDITORS HAVE NO CONSTITUTIONAL RIGHT TO PAYMENT OF THEIR CLAIMS IN CASH

It has long been understood that the secured creditors of a railroad in reorganization are not entitled to payment of their claims in cash. See *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (prohibiting secured creditors of the debtor from foreclosing on their collateral). Cf. *Wright* v. *Union Central Life Insurance Co.*, 311 U.S. 273. Indeed, far from being entitled to payment in cash, secured creditors of a debtor railroad may be required to accept junior securities or even common stock of the newly reorganized railroad. See, *e.g.*, *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co.*, 328 U.S. 495 (affirming a plan requiring junior creditors of the debtor to accept common stock); *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523 (affirming a plan requiring senior creditors of the debtor to accept junior securities or securities paying a lower interest rate); *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448 (affirming a plan requiring senior creditors of the debtor to accept preferred and common stock); *Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510 (affirming a plan requiring senior creditors of the debtor to accept junior securities).

Appellant does not contend otherwise. He argues instead that the Rail Act has converted the Penn Central reorganization proceeding into a condemnation

and liquidation proceeding, to which, he claims, different constitutional principles apply.[12] We disagree.

The Rail Act was enacted as a railroad reorganization statute intended to complement the operation of Section 77 of the Bankruptcy Act, 11 U.S.C. 205. That congressional intent is made manifest by the language of Section 207(b), which provides that "each United States district court or other court having jurisdiction over a railroad in reorganization * * * shall order that the reorganization be proceeded with pursuant to this Act unless it * * * has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act * * * and that the public interest would be better served by such a reorganization than by a reorganization under this Act * * *."

In a successful Section 77 reorganization, the reorganization plan generally calls for the creation of a new capital structure in which the value of the new securities is determined primarily on the basis of the railroad's projected future earnings. See 5 Collier, *Bankruptcy*, ¶77.18 (14th ed.). The new securities

[12] Appellant's argument is that the rail properties in their entirety are being condemned. We concede, of course, that any "shortfall"—*i.e.*, any difference between the constitutional minimum value of those properties and the value of the consideration received in return—could amount to a taking that would be compensable in the Court of Claims. See pp. 39–48 of our opening brief in No. 74–168. Appellant, however, demands cash payment of the entire constitutional minimum value of the rail properties, not merely of the shortfall. It is that demand we oppose here.

are distributed to the claimants against the debtor railroad on the basis of their seniority. See generally *Ecker* v. *Western Pacific R. Corp., supra.*

The method of reorganization prescribed by the Rail Act is essentially the same. But whereas Section 77 of the Bankruptcy Act basically provides a mechanism only for the separate reorganization of individual railroads, the Rail Act provides a means for an integrated reorganization of an entire regional railroad system. See Section 101(b)(2) of the Act. This system-wide reorganization is to be accomplished by an effective merger of bankrupt railroads into the Consolidated Rail Corporation pursuant to a "plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization." Section 102(6) of the Act. The estates of the debtor railroads will receive stock and securities in the Corporation in exchange for some or all of their rail properties; the stock and securities received from the Corporation and the other assets remaining in the estates, or the proceeds from their sale, will then be distributed among the claimants against the estates on the same seniority basis, according to the same standard of fairness and equity, as under Section 77.

It is of course clear that a railroad reorganization is not converted into a condemnation proceeding merely by virtue of the fact that it is accomplished through the merger of two or more railroads. Indeed, such mergers, although difficult to achieve, are at least theoretically possible under Section 77. See, *e.g., New Haven Inclusion Cases,* 399 U.S. 392. But appellant complains (Br. 69–76) that the merger to be effected under the Rail Act will in fact constitute

a condemnation of the rail properties of the bankrupt railroads, because (1) the federal government will share, at least temporarily, in the management of the railroad enterprise which will survive the merger, and (2) a bankrupt railroad's participation in the merger will not be conditioned upon the consent of its owners and creditors. Those features of the Rail Act do not affect its basic character as a reorganization statute. To the contrary, as we now show, they merely illustrate the "capacity of the bankruptcy clause to meet new conditions." *Continental Bank* v. *Rock Island Ry., supra,* 294 U.S. at 671.

1. The railroad enterprise which will survive the merger effected by the Rail Act will not be a federal instrumentality

The Consolidated Rail Corporation, to which the rail properties of the bankrupt railroads will be transferred pursuant to the final system plan, will be "a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government." Section 301(b) of the Rail Act. The common stock of the Corporation will be held privately. However, a large share of the Corporation's funding will be provided by the federal government in the form of loans from the United States Railway Association in an amount of up to one billion dollars. See Sections 210(b) and 211(c). In effect, the Association, and through it the United States, will be a major participant in the merger. In order to protect the federal government's substantial creditor interest in the Corporation, Section 301(d) of the Rail Act provides that as long as

at least 50 percent of the outstanding indebtedness of the Corporation consists of federal obligations, the Corporation's fifteen-member board of directors shall include the Secretary of Transportation, the Chairman of the Interstate Commerce Commission, the President of the Association, and five additional members to be appointed by the President with the advice and consent of Congress.[13]

Appellant concludes from this provision that "[t]he common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise" (Br. 72). Apparently implicit in this conclusion is the suggestion that the provision for federal participation in the management of the Corporation transforms the Corporation into a federal instrumentality that "takes" appellant's trust property by eminent domain. But that provision clearly has no such effect. Federal representation on the board of directors is merely a reasonable interim measure to protect the government's substantial interest as an investor. Full voting control of the Corporation will shift to the shareholders when federal obligations fall below 50 percent of the Corporation's indebtedness. Indeed, the shareholders will exercise such control from the outset of the Corporation's operations if the federal government is not at that point the majority creditor. In any event, since the

[13] The Rail Act also provides for federal audits of the Corporation and requires that the Corporation engage only in transportation-related activities so long as a majority of its indebtedness consists of federal obligations. Sections 301(f) and 302. The Corporation is also required to make annual reports to Congress. Section 301(g).

purpose of federal representation on the board of directors is merely to protect the government's financial interests, the obligation of the federally appointed directors will be no different from that of the directors chosen by the shareholders—to ensure that the corporation operates at a profit. Accordingly, notwithstanding any temporary federal participation in its management, the Corporation will be a private, not a governmental, enterprise.

It will be, moreover, a private enterprise owned by the previous owners of the rail properties transferred to it. Thus that transfer involves no "taking," by eminent domain or otherwise; the exchange of rail properties for stock and securities in the Corporation and other property effects merely a change in the form of ownership, just like any other merger or corporate reorganization. Cf. Section 368(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. 368(a)(1).

2. A reorganization plan may be imposed on a bankrupt railroad without securing the consent of its owners and creditors

Appellant contends (Br. 69–71, 84–87) that the claimants against a failing railroad have a constitutional right to terminate its rail services and liquidate its assets, and accordingly that any plan providing for a continuation of some or all of those services against the wishes of the owners and creditors, through a merger or otherwise, is a plan of condemnation rather than of reorganization. We have already shown, in our opening brief in No. 74–168 (pp. 16–37), that

the owners and creditors of a railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for as long as there are reasonable prospects for reorganization on an income basis, and that the Rail Act holds out such prospects for the railroads in reorganization. Thus railroad investors do not possess the unqualified right of termination and liquidation that appellant asserts here.[14] And, as we now discuss, it is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad without securing the consent of its owners and creditors.

Section 77 of the Bankruptcy Act requires the reorganization court to submit the plan of reorganization to each class of claimants for approval. The Rail Act, by contrast, does not give investors an opportunity to vote on the conveyance of rail properties to the Corporation.[15] The basic reason for this difference is obvious: the economic viability of a system-wide reorganization depends upon centralization of the planning function; it would be virtually impossible to create a workable regional rail system if the investors of each debtor railroad were entitled to determine which rail properties it would transfer to the Corporation and which it would sell or retain. Moreover,

[14] Nor do other investors. Creditors have no constitutional right to foreclosure and sale; they are entitled only to the "value of the property." *Wright* v. *Union Central Life Insurance Co.*, *supra*, 311 U.S. at 278.

[15] Section 77 will, however, afford the investors an opportunity to vote on the final distribution of the assets of the estate after the merger. The Rail Act merely adds to and does not replace the basic reorganization scheme under Section 77.

such investor determinations could not in any event be made intelligently; the investors could not evaluate the stock and securities to be received in exchange without knowing the final asset structure of the Corporation, but that structure would itself depend upon the outcome of the votes. There were thus valid reasons for not providing investors with an opportunity to vote on the merger. But the denial of a vote does not entail so great a departure from prior reorganization practice as appellant suggests. Under Section 77, the reorganization plan, if approved by two-thirds of each class, may be imposed on the dissenting minority. More significantly, however, Section 77(e) authorizes the court to confirm the plan despite the disapproval of any class of claimants, if the court finds the plan to be fair and equitable. This "cramdown" provision, which allows the court to substitute its judgment for that of the investors, has been expressly upheld as constitutional by this Court. *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co., supra,* 328 U.S. at 533. Thus it is clear that a railroad's investors have no constitutional right, either as individuals or as a class, to reject a fair and equitable plan of reorganization. Such a reorganization plan may be imposed on them without their consent.

This rule antedates Section 77. In equity receivership it was an accepted practice for the court to impose a reorganization plan upon objecting creditors. Section 77(e) served "merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part." *In re New York, N.H. & H. R. Co.,* 16 F. Supp. 504, 512 (D. Conn.). Thus Section 77(e)'s "cramdown" provision simply carries out

a long standing "public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier, *Bankruptcy*, ¶ 77.02 (14th ed.).

It is therefore clear that the mandatory nature of the merger to be effected under the Rail Act does not take that Act out of the constitutional ambit of reorganization legislation. The fact that the "cramdown" provision of Section 77(e) operates only after the investors have had an opportunity to express their views by balloting, whereas the Rail Act affords no such opportunity, is of course constitutionally insignificant. The degree of compulsion is the same whether the plan of reorganization is imposed over the objections of the investors, as under Section 77(e), or merely without seeking their approval, as under the Rail Act. That degree of compulsion, as *Denver & Rio Grande* demonstrates, does not transform a reorganization proceeding into a taking by eminent domain. Accordingly, reorganization, not condemnation, principles apply to the transfers under the Rail Act.

B. THE DEBTOR RAILROADS WOULD NOT BE ENTITLED TO RECEIVE CASH FOR THEIR RAIL PROPERTIES EVEN UNDER A CONDEMNATION STATUTE

As we have just shown, the Rail Act operates as a reorganization statute under which the creditors of the debtor railroads are not constitutionally entitled to payment of their claims in cash. But even if, as appellant contends, the mandatory conveyance provi-

sions of the Rail Act operate as a condemnation statute, and thereby cause a taking of the debtor railroads' rail properties by eminent domain, the corporation is not constitutionally required to pay cash in exchange for those rail properties.

Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Congress may in the exercise of its eminent domain power require an exchange of property for nonmonetary compensation. For example, as this Court held in *Bauman* v. *Ross*, 167 U.S. 548, the federal government may take land in exchange, at least in part, for the benefits which the government's use of that land confers on the landowner's adjacent property (167 U.S. at 584):

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and * * * no such prohibition can be implied * * *.

See also *United States* v. *1,000 Acres*, 162 F. Supp. 219 (E.D. La.).

This Court's observations in other cases that a property owner is entitled to the "full monetary equivalent of the amount taken" (*Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 473; see also *United States* v. *Miller*, 317 U.S. 369, 373, and *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326) do not signify that the

compensation must be paid in cash."[16] Those cases concerned only the amount of compensation required to be paid, not the form in which the property owners were entitled to receive it. The phrase "monetary equivalent" in that context was merely a shorthand method of expressing the principle that a condemnee is entitled to property equivalent in value to that which was taken. That principle is fully consistent with the *Bauman* rule that the compensation may be paid, wholly or in part, in nonmonetary form.

As this Court recognized in *Bauman*, application of the just compensation clause is simply a matter of assessing, on a case by case basis, the respective values of the property taken and the compensation offered; there is no constitutional requirement that the compensation be converted into cash in all cases. Moreover, a requirement that compensation be paid in cash would be particularly inappropriate in the circumstances of this case. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in return for indirect ownership of and claims against those same rail properties; each debtor railroad gives up an undivided interest in a part in exchange for a divided interest in the whole. This continued, although indirect, interest in the rail properties themselves is the "full and perfect equivalent of the property taken." *Monongahela Navigation Co. v. United States*, *supra*, 148 U.S. at 326.

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[16] Appellant also relies upon *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304. The decision in that case, however, was based upon state law. See *Satterlee v. Matthewson*, 2 Pet. 380, 414.

III

THE ABSENCE OF ANY PROVISION FOR A PRIOR JUDICIAL DETERMINATION OF THE FAIRNESS AND EQUITY OF THE CONSIDERATION TO BE PAID FOR THE DEBTOR RAILROADS' RAIL PROPERTIES DOES NOT RENDER THE RAIL ACT INVALID

Appellant contends (Br. 93–98) that even if the mandatory conveyance provision of the Rail Act is otherwise valid, it nevertheless denies the investors procedural due process because, unlike Section 77(e) of the Bankruptcy Act, it omits any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties. That omission does not render the Rail Act invalid.

1. The Rail Act provides an expedited process for implementation of the final system plan. The plan is to be certified to the special court within 90 days after its approval by Congress; the Corporation is to deposit its stock and securities in the special court within 10 days thereafter; following which the special court is to order conveyance of the debtor railroads' rail properties within an additional ten days. Sections 209(e) and 303(a) and (b). After the conveyance of the rail properties, the special court is to determine whether the consideration payable for the rail properties under the final system plan is "fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity ap-

plicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act * * *." Section 303(c)(1)(A). If the special court determines that the terms of one or more exchanges is not fair and equitable, it may under Section 303(c)(2) reallocate the securities among the debtor railroads, order the transfer of additional securities and obligations, and, if necessary, enter a judgment against the Corporation. The determination of the special court would be reviewable by this Court. Section 303(d).

Appellant is concerned that the inevitably protracted evaluation proceedings under Section 303 may not, in the end, result in the payment of constitutionally sufficient consideration to the estates of the debtor railroads, and that those estates would then be without a remedy.[17] He therefore claims the right to a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties.

Appellant errs in his basic premise. The estates of the debtor railroads will not be without a remedy in the event the consideration payable under the Rail Act proves to be constitutionally insufficient. To the contrary, they will be entitled to recover any constitutional deficiency in an action under the Tucker Act in the Court of Claims (see pp. 39–48 of our opening brief in No. 74–168).

A preconveyance judicial determination of fairness and equity is therefore not necessary for the protec-

---

[17] Appellant assumes, as do we, that reconveyance of all the rail properties would not be feasible.

tion of the estates' substantial rights. Due process, accordingly, does not require such a determination: "[d]ue process of law guarantees 'no particular form of procedure; it protects substantial rights.'" *Mitchell v. W. T. Grant Co.*, No. 72–6160, decided May 13, 1974 (slip op. 10). Thus due process requires, at most, that prior to the conveyance the debtor railroads' estates be granted judicial assurance that they will ultimately receive no less than the constitutional minimum value of their rail properties. This Court, by upholding the availability of the Tucker Act remedy, will provide that assurance and thereby afford appellant the only preconveyance judicial determination that due process requires.

2. We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of consideration payable under the final system plan. We have shown above (pp. 22–23, *supra*), however, that those estates will, if necessary, be able to secure such a determination from the special court. There is therefore no basis for declaring the Rail Act "facially defective" (Appellant's Br. 98) on due process grounds.[18]

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[18] Preconveyance litigation over the fairness and equity of the proposed consideration would, however, appear to require incidental invalidation of the provisions of the Rail Act that set forth an expedited schedule for implementation of the final system plan. Such litigation could be expected to be time-consuming and the court might be required, in order to preserve its jurisdiction

IV

THE RAIL ACT IS NOT INVALID AS A GEOGRAPHICALLY NONUNIFORM LAW ON THE SUBJECT OF BANKRUPTCIES

Appellant contends (Br. 99–107) that the Rail Act is void for want of geographical uniformity. The district court below rejected that contention except with respect to the provision of Section 207(b) that requires the dismissal of certain reorganization proceedings. In our opening brief in No. 74–168 (pp. 49–54), we showed that neither Section 207(b) nor any other provision of the Rail Act is invalid under the uniformity requirement of the bankruptcy clause. We merely summarize the relevant points of that argument here: (1) the Rail Act applies uniformly to all reorganizations of operating railroads and the fact that those reorganizations happen to be located in the northeastern section of the nation does not violate the requirement of geographical uniformity; (2) the uniformity requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination; (3) the Rail Act may in any event be sustained as a proper exercise of commerce power.

(see 28 U.S.C. 1651(a)), to enjoin the Association from certifying the final system plan, or the Corporation from depositing its stock and securities, within the 90-day and 10-day periods respectively prescribed by Sections 209(c) and 303(a).

CONCLUSION

The judgment of the district court should be affirmed insofar as it denied appellant's request for declaratory and injunctive relief.

Respectfully submitted.

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No. 74–166

REGIONAL RAIL REORGANIZATION CASES

RICHARD JOYCE SMITH, Trustee of the Property
of
The New York, New Haven and Hartford
Railroad Company, Debtor, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Cross-Appellees

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF CROSS-APPELLANT

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v.

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ON CROSS-APPEAL FROM THE
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DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF OF CROSS-APPELLANT

INTRODUCTION

This reply brief is submitted on behalf of Cross-Appellant, Richard Joyce Smith, Trustee of the Property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and "New Haven," respectively). This brief will address the contentions made by the United States and the other governmental parties (herein collectively the "United States") in the brief for the Federal Appellees dated September, 1974, and the separate brief of United States Railway Association ("USRA") dated September 26, 1974.

This reply brief is in of two parts. Part One consists of an argument in reply to points made by the Cross-Appellees. Part Two is an analysis of the opinion of the Special Court dated September 30, 1974 holding that Penn Central is required to reorganize pursuant to the Regional Rail Reorganization Act of 1973 ("RRRA").

The Penn Central Trustees intervened in the action below as defendants, aligned with the United States and USRA as supporters of the constitutionality of the RRRA based on the alleged existence of a "Tucker Act remedy" under 28 U.S.C. §1491. On this cross-appeal the Penn Central Trustees, while maintaining their original position that the RRRA is allegedly constitutional because of the putative existence of a Tucker Act remedy, have parted company with the United States and USRA and have aligned themselves with the New Haven Trustee. The Penn Central Trustees take the position that the constitutional issue of whether the RRRA violates the New Haven Trustee's Fifth Amendment rights is ripe for adjudication; and the Penn Central Trustees argue that, absent a definitive judgment as to a Tucker Act remedy, the RRRA is unconstitutional insofar as it would, in an eminent domain context, fail to assure that the Penn Central estate will receive money or its perfect equivalent in an amount equal to the highest and best use value of its properties. See Penn Central Trustees' brief as Appellant in No. 74-165 (at 30-47, as to interim erosion taking; at 48-54, as to ripeness of permanent taking issue; at 54-62, as to the failure of the RRRA to assure just compensation for either interim erosion takings or the permanent taking; at 63-65, as to limits upon the defenses that may be deemed open to the United States in any Tucker Act action; and at 65-67, as to valuation of Conrail securities at actual fair market value rather than on a capitalization-of-prospective-earnings valuation).

PART ONE: ARGUMENT IN REPLY TO CROSS-APPELLEES

I

THE CONSTITUTIONAL ISSUES RAISED BY THE CROSS-APPEAL ARE RIPE FOR ADJUDICATION

The United States and USRA seek to have the Court defer consideration of the constitutional issues presented based on the dual contention that "manifold uncertainties" attend the operation of the RRRA, and that "later and better opportunities" are available for judicial determination of the New Haven Trustee's claim that the RRRA, on its face, offends his Fifth Amendment rights. United States' brief at 16-24. USRA makes a similar argument, but in addition claims that the interim erosion taking issue decided by the court below is not ripe for adjudication. USRA's brief at 15-33.

A. The Alleged Existence of a Tucker Act Remedy Does Not Operate to Make Constitutional Issues Premature Because an Action for an Inadequately Compensated Taking Will Lie Only if the RRRA Is Constitutional

A pervasive fallacy in the Federal Appellees' prematurity contention is the premise that the Tucker Act, by providing post-conveyance judicial review of the adequacy of the compensation for a taking by eminent domain, will provide an alternative form of judicial review of the same constitutional issues raised here. This premise is fallacious because, as we have previously shown (New Haven Trustee's brief as Appellee at 62-64), the Government's argument places the cart before the horse: the Tucker Act claim will be a valid cause of action only if the RRRA is a constitutionally valid exercise of the sovereign's power of eminent domain. But that is the very issue which the United States and USRA claim is premature.

B. The New Haven Trustee Will Not Have a "Later and Better Opportunity" to Have an Adjudication of His Claim that the RRRA's Compulsory Conveyance Provisions Are Unconstitutional

Aside from the Tucker Act remedy argument, the only basis upon which the United States and USRA suggest that there will be a "later and better opportunity" to adjudicate the constitutional issues now presented is that the New Haven Trustee might apply to a court convened under 28 U.S.C. §2284 on some day prior to the 60th day after submission by USRA to Congress of a final system plan, for an injunction against certification of such a plan by USRA to the Special Court pursuant to §209(c) of the RRRA.

But the RRRA itself will frustrate any attempt to secure subsequent judicial review because the injunction action which USRA claims could be brought at a later date is specifically barred by §209(a), first sentence, if not granted before the end of the 60th calendar day after submission of a final system plan to Congress:

> "Notwithstanding any other provision of law [a phrase which presumably includes all of Title 28, United States Code], the final system plan which is adopted by the Association [USRA] and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section."

It should be noted that, even while arguing that the present action is premature, the United States and USRA have carefully refrained from stipulating that they will not, in a subsequent action before a §2284 court, raise the issue of the allegedly exclusive jurisdiction of the Special Court.[1]

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[1]The issue of exclusive jurisdiction of the Special Court has already been raised once in *Smith v. United States* before the Judicial Panel on

(footnote continued on next page)

Thus, the only court with unassailable jurisdiction to enjoin certification to the Special Court of a final system plan is the Special Court itself. However, the Special Court's decision as to any application for an injunction is foreordained by its decision dated September 30, 1974 holding that Penn Central is subject to the RRRA on the basis of there being a Tucker Act remedy to rectify any failure of the RRRA to compensate Penn Central for its interim erosion and for the taking of its properties.[2]

The alleged "later and better opportunity" offered by the United States for the Court to adjudicate the constitutional issues now presented does not in fact exist for precisely the reasons set forth in the New Haven Trustee's brief as Cross-Appellant (at 24-31 and 34-35). The Government's prematurity argument, it is submitted, is not an attempt to assist this Court in de-

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(footnote continued from prior page)

Multi-District Litigation, and decided against the United States and USRA. *In re Litigation Under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). The Panel's *Per Curiam* decision stated: "The Panel has carefully considered the respective contentions of the parties and finds that transfer of these actions under Section 209(b) of the Act to the Special Court must be denied." However, it can be expected that in response to any future action to enjoin implementation of the RRRA, the United States and USRA will apply to the Special Court for an injunction prohibiting suits in other courts. It is not clear that such an injunction, if granted, could be appealed to this Court.

[2] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8, *et al.*, Sept. 30, 1974). The Special Court has stayed its mandate of reversal of Judge Fullam's Order No. 1596 (JA 152) pending a decision by this Court on the instant cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168). If the Court does not reach the issue of the unconstitutionality of the RRRA, and of the existence of a Tucker Act remedy, the Special Court's decision will stand that the RRRA is constitutional and that a Tucker Act remedy exists under which the Penn Central Trustees and its creditors may sue the United States for money damages in the Court of Claims. See Part Two, *infra*, for an analysis of the Special Court's decision.

ciding the constitutional issue at a time when more facts about the final system plan will be known. The United States would prefer to postpone adjudication of the constitutionality of the RRRA until Conrail's take-over of Penn Central's rail properties is an accomplished fact. At that point, the New Haven Trustee and the New Haven bondholders will be remitted to the Court of Claims as their only remedy, without even a decision here that a valid cause of action exists in the Court of Claims.

II

THE NEW HAVEN TRUSTEE, AS A SECURED CREDITOR OF PENN CENTRAL, HAS STANDING TO ASSERT PENN CENTRAL'S RIGHTS UNDER THE FIFTH AMENDMENT, AS WELL AS HIS OWN RIGHTS, SINCE DIVESTMENT OF HIS LIENS BY §303(b)(2) OF THE RRRA IS A TAKING OF HIS PROPERTY WITHOUT JUST COMPENSATION

The United States' brief (at 24-25) challenges the standing of the New Haven Trustee to seek injunctive relief. USRA apparently concedes the standing issue.[3] The United States' standing argument is without substance.

First, the New Haven Trustee as a secured creditor of Penn Central, with a claim of some $124 million, plus interest, in default for over four years, has an obvious financial stake in a proposal under which a major portion of Penn Central's rail assets will be, in effect, converted into securities of uncertain market value. The New Haven Trustee claims that it is unconstitutional for Congress to require that Penn Central's

[3]See USRA's brief at 34 n.30.

rail assets be exchanged solely for securities of Conrail and USRA, without a *prior* judicial determination that the securities of Conrail and USRA have a fair market value equal to the highest and best use value of the properties conveyed. It is obvious that the New Haven Trustee has a direct financial stake in Penn Central sufficient to sustain his standing.

Second, the United States' argument ignores the challenge which the New Haven Trustee makes in his own right, *qua* secured creditor of Penn Central, that the divestment of *his* lien by §303(b)(2) of the RRRA is unconstitutional on its face.

Section 303(b)(2) provides in pertinent part:

> "(2) All rail properties conveyed to the Corporation [Conrail] and the respective profitable railroads . . . under this Section shall be conveyed free and clear of any liens or encumbrances. . . ."

The New Haven Trustee's standing as a lien creditor to challenge this portion of the RRRA is clear. *Cf. Armstrong v. United States*, 364 U.S. 40 (1960).

III

THE RRRA, CONSIDERED AS A REORGANIZATION STATUTE, IS INVALID AS A VIOLATION OF THE FIFTH AMENDMENT'S DUE PROCESS AND TAKINGS CLAUSES

The United States' brief (at 26-34) and USRA's brief (at 33-50) make an elaborate argument to the effect that, the Fifth Amendment notwithstanding, Congress has the inherent power under the Bankruptcy Clause to enact the RRRA.[4]

The New Haven Trustee does not challenge the doctrine that Congress has broad authority under Art. I, §8, Cl. 4 to pass laws on the subject of bankruptcies. The issue is not whether such power exists, but whether in the RRRA Congress, in purporting to exercise it, has transgressed the limits of the Due Process and Takings clauses of the Fifth Amendment. See New Haven Trustee's brief as Cross-Appellant (at 37-51), wherein the legal and factual setting of the RRRA is analyzed. The RRRA is, as Judge Fullam has recognized, an "*amalgam* of sale, reorganization and eminent domain concepts." (JA 77; emphasis added). See New Haven Trustee's brief as Cross-Appellant (at 47-51).

Indeed, each time the United States and USRA assert that a Tucker Act remedy exists, they implicitly

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[4]The arguments ignore Fifth Amendment limitations, and assert only the positive power granted by Art. I, §8, Cl. 4, as is evident from the captions:

"A. The Rail Act Operates As A Reorganization Statute Under Which Creditors Have No Constitutional Right To Payment of Their Claims in Cash." (United States' brief at 26).

"A. Congress Has Broad Authority To Provide for the Adjustment of Creditors' Claims in Corporate Reorganizations." (USRA's brief at 35).

recognize that the RRRA is, at least in substantial part, an eminent domain statute. The Tucker Act remedy could exist only under the theory of "inverse eminent domain." See New Haven Trustee's brief as Appellee (at 38-64).

The cases cited by the United States and USRA to uphold the authority of Congress to pass laws providing for reorganization of financially embarrassed railroads stand only for the proposition that §77 of the Bankruptcy Act is valid legislation as applied to railroads which are able to reorganize, either on an income basis, or by sale of their properties to a trunkline carrier, or conceivably by sale of their properties to public authorities in negotiated transactions or by condemnation.

The problem presented by the RRRA as it relates to Penn Central is that Penn Central cannot be "reorganized" in the accepted legal definition of that term. If Penn Central were an ordinary business corporation, and not affected with an overriding public interest, based on the findings of fact in Opinion and Order No. 1543 (JA 89-101) there would be no alternative to its being adjudicated a bankrupt and its properties liquidated for the benefit of its creditors and stockholders. If the overriding public interest does in fact require a different result, without regard to the wishes of the present owners of and claimants to Penn Central's property, then it is reasonably obvious that the constitutional power which Congress must look to is the eminent domain power. As Judge Fullam noted in his opinion below:

> " . . .the plain purpose of the entire arrangement [of the RRRA] would be to insure the continued availability of these rail properties for use in meeting the public need for continued rail service, without regard to the wishes of the present owners of the properties." (JA 78).

As the arguments for and against the Tucker Act remedy attest, the real issue in the New Haven Trustee's cross-appeal is not whether the RRRA can be sustained *entirely* as a Bankruptcy Clause enactment. The real issue is, given the "amalgam" of eminent domain, sale and reorganization concepts which find expression in the RRRA, can Congress enact a "chameleon" like statute which is supportable in part under the Bankruptcy Clause, but when that Clause is exhausted by Fifth Amendment limitations, can change color so as to be a putatively valid exercise, in part, of the eminent domain power.

IV

PENN CENTRAL IS ENTITLED TO RECEIVE THE HIGHEST AND BEST USE VALUE OF ITS PROPERTIES AS A COMPLETE TRANSPORTATION SYSTEM IN MONEY OR ITS PERFECT EQUIVALENT; THE NEW HAVEN TRUSTEE IS ENTITLED TO FORECLOSURE ON HIS LIENED PROPERTY, OR THE FAIR VALUE THEREOF

A. The Railroad Enterprise Which Would Survive the RRRA, if It Is Not Enjoined, Will Be in Substance a Public Authority

The United States and USRA seek to negate the clear implication of §301 of the RRRA that Conrail will, in substance, be a public authority with a governmentally appointed management.

The history of Penn Central's reorganization during the past four years strongly suggests that Conrail will be dependent upon the Government indefinitely

for its capital funds.[5] Penn Central could not, even with the priority accorded to Trustees' Certificates, raise capital funds except with government guarantees. Amtrak, which was originally in concept supposed to be a private for-profit enterprise, is not private and is not profitable; it is, rather, dependent upon annual congressional budget appropriations both to finance its capital expenditures and its enormous operating losses. The losses result in large part from its payments in excess of $100 million per year to Penn Central for intercity passenger train service, without the receipt of which Penn Central's loss would be much greater.[6]

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[5]In a speech to the Fourth Annual Transportation Forum on September 30, 1974, Arthur D. Lewis, Chairman of USRA, stated:

> "First, the task of restructuring the bankrupt railroads into an economically healthy system is one which will require substantial financial aid. The current state of the Penn Central demonstrates the dimension of the capital investment required to create an efficient, economical and dependable physical plant for the railroads of the region.
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> * * *
>
> "Obviously, the problem is immense in scope and complexity. Penn Central has estimated that restoration of its properties will require over $3.3 billion, in 1973 prices, spent over the next eight years. Only a little over $2.0 billion will be generated internally and more than $1.0 billion will have to come from outside sources of capital. These figures are staggering, especially when viewed in the light of today's inflationary trends. This expenditure program will take place when costs will average half again as much as in 1973 (if we are lucky). The implications for the Association and for the entire rail industry as well are quite serious: much higher levels of revenues, investment and profitability will have to be achieved than ever achieved in the past, if private capital is to be used for the massive rebuilding requirements of railroad properties." Press Release of USRA, Office of Public and Governmental Affairs, Sept. 30, 1974, at 3.

[6]In the calendar year 1973, Amtrak's remuneration to Penn Central amounted to $131,510,000. Form R-1 Report, Schedule 600. In spite of payments received on account of contract service for Amtrak's account, Penn Central's passenger rail operations resulted in a loss (before fixed charges) of $45,825,000. Form R-1, Schedule 300, Col. (j).

In a Press Release dated August 22, 1974, a copy of which is reprinted as Appendix B to the September 30, 1974 decision of the Special Court,[7] USRA candidly acknowledges:

> "The level of rehabilitation . . . required and the possible payment of 'real' money [presumably as contrasted with paper securities] for the assets at some point in time *makes Conrail viability uncertain.* To protect government funding *against this risk of default* the law *already* sets up Presidential appointments as the majority of the *Conrail* board for an unspecified (but lengthy) period of time. The more federal funding required . . . the greater the risk of a *permanent federal role.*" Slip opinion at B-3 (emphasis added).

B. Since the RRRA is Invalid as Bankruptcy Legislation, the Compulsory Conveyance Provisions, Considered as an Exercise of Eminent Domain Power, Require Application of Principles of Condemnation Law to Determine Whether Payment of the "Constitutional Minimum" is Assured

USRA argues that establishment of the legal standard of "constitutional minimum" is one reserved by Congress exclusively to the Special Court, and that no prior decision of this Court has any bearing on the issue of the valuation methodology to be employed in giving body to the skeletal phrase "constitutional minimum" employed in the RRRA (USRA's brief at 58-64). This argument is not addressed to any relevant issue in this cross-appeal. The New Haven Trustee does not seek an advance declaratory judgment from the Court that will be binding on the Special Court when, as and if proceedings mandated by §303(c) of the

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[7] *In the Matter of Penn Central Transportation Co.* (Special Court, Regional Rail Reorganization Act, No. 74-8 *et al.*, September 30, 1974), slip opinion at B1-B3.

RRRA are instituted, which could only be *after* the conveyances provided in §303(b). The New Haven Trustee seeks to enjoin §303(b) from being implemented on the ground that it is unconstitutional insofar as §303(c) does not assure Penn Central or the New Haven Trustee of the receipt of money for their respective property interests.

C. Penn Central's Rail Properties Have a Condemnation Value as a Complete Transportation System Which is Greater than the "Bare Bones" Liquidation Value of its Rail Properties

USRA's brief (at 64-70) asserts that the precedents of the *Fifth Avenue Bus*[8] and *Hudson Rapid Tubes*[9] cases do not apply to a federal eminent domain statute. USRA claims that the United States is subject to a lesser standard of just compensation than the states when Congress concludes that a major interstate railroad has in the 1970's encountered the same difficulties which the urban street railways, subway systems and bus companies encountered in the period of the 1940's, 1950's and 1960's.[10] USRA does not spell out its rationale for contending that a railroad operating in more than one state has lesser constitutional rights than a railroad which operates, for example, solely in the State of New York. To the extent that relevant constitutional decisions of state courts are relied upon by the New Haven Trustee, those decisions are based on the Fifth Amendment's "just compensation" clause, and cite precedents of the Court interpreting

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[8] *In re City of New York (Fifth Avenue Coach Lines)*, 18 N.Y. 2d 212, 219 N.E. 2d 410, *appeal dismissed sub. nom. Fifth Avenue Coach Lines v. City of New York*, 380 U.S. 778 (1966).

[9] *In re Port Authority Trans-Hudson Corp.*, 20 N.Y. 2d 457, 231 N.E. 2d 743, *cert. denied sub. nom. Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 390 U.S. 1002 (1968).

[10] The United States' brief does not address this issue.

the United States Constitution as well as precedents of the state courts. For example, in the first decision by the Court of Appeals of New York in the *Fifth Avenue Bus* case, it was noted that:

> "When private property is taken for public use, our State and Federal Constitutions alike mandate the payment of 'just compensation' (N.Y. Const., art. I., §7; U.S. Const. 5th Amdt.)." 219 N.E. 2d at 415 (Keating, J., dissenting on other grounds).

The rationale of the majority of the Court of Appeals[11] stressed that a regulated public utility, whose rates were fixed in large part by political expediency rather than by the value of the service it performs for the public, is in a peculiarly disadvantageous position in a period of high inflation:

> "The problems raised in this condemnation proceeding are difficult and to a degree unique. In this era of spiraling inflation such proceedings will continually reoccur since it is beyond the resources of private enterprise to provide mass transportation at modest rates, dictated by political exigencies and confiscatory as far as the equity in the business is concerned." 219 N.E. 2d at 411.[12]

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[11] All seven judges of the Court of Appeals of New York approved the concept that the two bus companies (Fifth Avenue, which operated in Manhattan, and Surface Transportation, which operated in The Bronx) were entitled to be paid for their physical assets on the basis of "reproduction cost new, less depreciation;" and all seven judges further agreed that the bus companies were entitled to an additional amount reflecting their going-concern or "assemblage" value as complete transportation systems, in spite of the fact that their operations were substantially unprofitable. The Court of Appeals, in complete agreement on the law, split 4-3 as to whether the Appellate Division had correctly applied the law.

[12] *Cf.* USRA brief (at 66) arguing that any valuation of Penn Central that would allow value to be ascribed to Penn Central Company's stock interest in Penn Central would amount to "a rich $13.5 billion bonanza against which valid pre-bankruptcy claims may total no more than $2.7 billion." USRA plainly intends that the RRRA shall not result in any pay-

(footnote continued on following page)

Judge Burke then quoted from the Court's opinion in the *Monongahela Navigation* case,[13] indicating that in his view the words "just compensation" have the same meaning in the New York State Constitution as in the United States Constitution.

Judge Burke concluded:

> "In the case before us, claimants' property was a viable operative transit system and was taken as such, with a clearly expressed intent to so operate it after the forced transfer of title. . . . Claimants' undeniably competent and efficient personnel were taken over by the City along with the claimants' routes, franchises, operating schedules, accounting and maintenance records, etc.—all going concern assets for which claimants must be duly compensated." 219 N.E. 2d at 415.

The effect of the RRRA in transferring Penn Central as a complete transportation system to the ownership of Conrail is substantially identical.

The New Haven Trustee agrees that "condemnees may not demand an artificial or inflated value based on the public need."[14] He does not seek a "hold-up" value, as alleged by USRA (USRA's brief at 65). However, as all seven judges of the Court of Appeals recognized in the *Fifth Avenue Bus* case, when a public authority takes a privately-owned transportation facility for continued public use because of the public need for its service, and the inability of private enterprise to

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(footnote continued from prior page)

ment in respect of Penn Central Company's equity in Penn Central Transportation Company. It is also significant that USRA excludes approximately $1 billion of post-reorganization liabilities in comparing the reproduction-cost-new-less-depreciation value of the assets with the claims against the estate.

[13] *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

[14] Keating, J., dissenting on other grounds in the first *Fifth Avenue Bus* decision, 219 N.E. 2d at 415.

operate profitably, the condemnee, while not entitled to "hold up" the public or to claim an award based on the amount it would cost the public to construct a new facility having comparable public service benefits, is entitled to compensation for "assemblage" value of its transportation system beyond the "bare bones" of its physical assets valued under the reproduction-cost-new-less-depreciation formula.[15]

In the *Hudson Rapid Tubes* case, Judge Keating, who dissented in the *Fifth Avenue Bus* case, wrote the opinion of the court.[16] Judge Keating relied on this Court's holding in *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) that

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[15]Judge Keating, dissenting on other grounds, observed:

"In addition [to the value of the physical assets], there is real value attributable to the fact that these tangible assets are not isolated units. They are fully integrated and operating transit systems, held together by personnel available and working, franchises, operating schedules, established routes, accounting and maintenance records and all of the other elements which spell the difference between 'bare bones' and a transportation system in operation. These are but elements of a 'going concern' for which a buyer would willingly pay. . . . As elements of a business which have value, it is only proper that they should be considered part of the 'just compensation' to which the condemnees are entitled and so the case law has consistently held." 219 N.E. 2d at 416.

The cases cited by Judge Keating include the following decisions of this Court: *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Des Moines Gas Co. v. City of Des Moines*, 238 U.S. 153 (1915); *City of Omaha v. Omaha Water Co.*, 218 U.S. 180 (1910); *Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918). *Kimball Laundry Co. v. United States, supra*, is cited in USRA's brief (at 67 n. 77 and 69 n. 83) as *contra* authority to the New York State Court decisions; it is not.

[16]USRA's brief at 69 states:

"In a forceful dissent, the author of the Fifth Avenue opinion [i.e. Judge Burke] noted the illogic of basing an award on original cost when the current market value did not reflect that cost."

The same Judge Burke, one year later, in his second *Fifth Avenue Bus* decision, 22 N.Y. 2d 613, 241 N.E. 2d 717 (1968), stated:

"In the *Port Authority* case, the 'willing buyer' rule was rejected and the rule set forth in *Fifth Avenue* reaffirmed." *Id.* at 720.

(footnote continued on following page)

> " '. . . when [the] market value [of a condemnee's property] has been too difficult to find, or *when its application would result in manifest injustice to owner or public*, courts have fashioned and applied other standards.' " 231 N.E. 2d at 738, quoting 339 U.S. at 123 (emphasis supplied by Judge Keating).

The significance of the *Fifth Avenue Bus* and *Hudson Rapid Tubes* cases to the issues presented by this cross-appeal is as follows:

1. It cannot be the law that states are forbidden to take private property for public use without just compensation payable in money, but the federal government is not subject to the same strictures. Any suggestion that the rationale of *Fifth Avenue Bus* and *Hudson Rapid Tubes* is not applicable here because we are dealing with the Fifth Amendment's "just compensation" clause, and not the State of New York's "just compensation" clause, should be rejected. Contrariwise, if the compulsory conveyance provision of the RRRA were held to be a valid device by which the United States Government could take the properties of an interstate railroad for public purposes and issue securities of the taking authority as the payment therefor, then the State of New York could not be prohibited from authorizing, for example, a take-over of a

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It is obvious that Judge Burke's dissent in the *Hudson Rapid Tubes* case turned on his very different view of the facts: in his view, the tunnel railroad constituted a "decrepit, financially hopeless transportation system, tailored to the measurements of an ancient, badly mended tunnel. . . ." 231 N.E. 2d at 742 n.1.

On its facts, Penn Central more closely resembles the *Fifth Avenue Bus* situation than it does the *Hudson Rapid Tubes* situation. Penn Central's present plight is in large measure the result of years of regulatory constraints, including the necessity to operate money-losing passenger train and freight services. But for these regulatory constraints, Penn Central might well be a profitable railroad, just as Fifth Avenue Bus Company might have been profitable had it been allowed to charge fares determined solely by business considerations.

railroad such as the Long Island Railroad in exchange for securities of a state transportation authority. Yet such a result would be difficult to reconcile with the decisions interpreting the Fourteenth Amendment.

2. In the valuation of physical properties of a complete transportation system in condemnation, the whole may well be worth more than the sum of the parts. Whether the excess value is called "going concern value" or "assemblage" value, it is clearly a value which must be reflected in a condemnation award. That value need not be the same as today's cost in assembling transportation corridors, because today's assemblage cost would represent value to the condemnor, not loss to the condemnee.

3. On the other hand, the assemblage value is not proven to be zero by reason of the unprofitability of the private transportation system in the regulated environment in which it was forced to operate. That is the meaning of *Fifth Avenue Bus*. The United States cannot first insist that Penn Central incur large losses by requiring it to maintain rail passenger operations at huge deficits, and to service lightly used freight lines; and then, when it condemns the property for the same use, declare that the "going concern" value is zero because "substantial prices are not paid for the privilege of conducting a business at a loss."[17]

4. The value of the physical properties themselves will vary depending on whether they are single-use or multi-use properties and on many other factors. A series of railroad tunnels which bisect mid-town Manhattan and are absolutely essential for through passenger trains from Washington to Boston, as one

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[17]Mr. Justice Cardozo in *Roberts v. City of New York*, 295 U.S. 264, 282 (1935), quoted in USRA's brief at 67.

example, are likely to have a value of a different order of magnitude than a tunnel of equal length bisecting mountains in rural Pennsylvania where alternative rail routings exist. The *Hudson Rapid Tubes* case does not stand for the proposition that historical cost less depreciation is the guide; if it did, it would be inconsistent with both the first and second *Fifth Avenue Bus* decisions, where the physicial assets were valued at reproduction cost new less depreciation. As the Court pointed out in *New Haven Inclusion Cases, supra,* 399 U.S. 392, 482 n. 80 (1970), the decisional principle for which both *Fifth Avenue Bus* and *Hudson Rapid Tubes* can be cited is that the New York courts "awarded the owners the value reflecting the highest and best price for their properties," which the Court held was "precisely the treatment accorded the New Haven" in its sale of rail properties to Penn Central.

The New Haven Trustee and the Penn Central Trustees are in agreement on the proposition that, in an eminent domain context, Penn Central is entitled to the highest and best use value for its properties. Such value will, in turn, assure secured creditors of Penn Central that they will receive either payment of their claim in full, or if the properties securing their claim have a lesser value, the value of the properties so determined. Such a result would be in perfect harmony with the Court's decision in *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273 (1940), discussed in USRA's brief at 44-47. See also United States' brief at 26 and 32 n. 14.

D. The Governmental Appellees Cannot Have it Both Ways—Either the RRRA Is an Unconstitutional Attempt to Take Private Property Without Exercising Eminent Domain Powers; or the RRRA Is Equivalent to Nationalization of Penn Central

USRA mistakenly asserts that the New Haven Trustee affirmatively advocates nationalization of Penn Central, and seeks to have the Court exceed its proper role by advising Congress on "how to amend or replace" the RRRA. USRA's brief (at 70-72). This is a distortion of a section of the New Haven Trustee's brief as Cross Appellant which discusses a public interest solution which might, but only if Congress (not the Court) concurred, be deemed a navigable route between the Scylla of a complete cessation of rail operations in the most heavily industrialized area of the United States and the Charybdis of a Tucker Act judgment against the United States Treasury amounting to hundreds of millions or billions of dollars. See New Haven Trustee's brief as Cross-Appellant (at 88-92).[18]

The Federal Appellees should not be permitted to have it both ways at once—either the RRRA is sustainable as eminent domain legislation, in which case there is a Tucker Act remedy; or it is not so sustainable, in which case it is unconstitutional.

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[18]To carry the metaphor one step further, it is a well-charted seaway marked by the nearly universal experience of the industrialized democracies—England, France, Germany, Italy, Switzerland, Japan and even, to a great extent, Canada—all of whom have nationalized their more important railroads while allowing peripheral lines to remain private. It is not a demonstrable fact that these nations have experienced "higher costs and inefficiencies that public ownership implies." USRA's brief at 71. Moreover, as the New Haven Trustee pointed out (Cross-Appellant's brief at 89 n. 81), if Conrail proves to be profitable, the United States can turn it back to the private sector; if it turns out to be not profitable, the case law suggests that the economic burdens must be distributed equitably via taxation.

The New Haven Trustee does not, as USRA asserts

> "prefer to have that [a public-interest solution] accomplished by nationalization, a process he believes will constitutionally entitle him to compensation wholly in cash, and possibly in a much higher amount than obtainable in reorganization." USRA's brief at 71.

The New Haven Trustee's position, so far as here relevant, is set forth at 88-92 of his brief as Cross-Appellant, and speaks for itself. Contrary to USRA's characterization of his argument, the New Haven Trustee believes that the value of the properties subject to his liens is in excess of $123,809,404 plus interest; he believes, based on his knowledge as to the value of these rail properties, that he will ultimately receive $123,809,404 plus interest; he cannot, under any imaginable circumstance, claim *more* than $123,809,404 plus interest; and, so long as he retains his liens and ultimately receives either the right to foreclose on his properties or the cash equivalent of his foreclosure right, the New Haven estate will receive the protection accorded by the Fifth Amendment and the Court's decision in *New Haven Inclusion Cases.*

Under the theory of *Armstrong v. United States, supra,* it is reasonably clear that the United States cannot expropriate, without payment, the New Haven Trustee's liens securing his $123,809,404 claim. This case concerns expropriation, not nationalization. See §303(b)(2) of the RRRA. USRA asserts that the Court's role is limited to adjudicating whether the RRRA is constitutional or not. The New Haven Trustee agrees. If the Court upholds the Tucker Act argument of the United States and USRA, however, it is reasonable to infer from the views of the sponsors of this legislation in both the House and the Senate that Congress may well decide to repeal the RRRA. If the Court upholds

the injunction issued below, but does not reach the issue raised by the New Haven Trustee's cross-appeal, Congress will be in the dark as to the limits of its constitutional powers when it comes to amend or repeal the RRRA. If the Court decides the cross-appeal in favor of the New Haven Trustee, Congress will be on notice as to the applicable Fifth Amendment principles. That will fulfill the Court's role, and leave the political decision to Congress and the President.

V

THE LACK OF PRE-CONVEYANCE JUDICIAL REVIEW OF THE FAIRNESS AND EQUITY OF THE MANDATORY CONVEYANCES OFFENDS DUE PROCESS

USRA attempts to justify the RRRA's failure to afford procedural due process by comparing it to §77(o).[19] However, §77(o) relates essentially to incidental sales; a sale of the nature that would be involved in the compulsory transfer to Conrail has been held to be beyond the scope of §77(o).[20] Further, §77(o) provides significant safeguards that are absent from the RRRA. For example, no transaction of sale may be effected under §77(o) unless the trustees of the debtor, who have fiduciary duties to the creditors and stockholders, affirmatively recommend that it is in the best interest of the debtor's estate; and even then any proposed transaction must be approved *as to its specific terms* by the reorganization court.

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[19] "The whole of the Rail Act is very roughly analogous to Section 77(o). . . ." USRA's brief at 41.

[20] *In re Penn Central Transportation Co. (Park Avenue Properties)*, 484 F. 2d 323 (3d Cir.), *cert. denied sub nom. Baker v. Morgan Guaranty Trust Co. of N.Y.*, 42 U.S.L.W. 3334 (U.S., Dec. 3, 1973).

More to the point is a significant concession contained in the United States' brief:

> "We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of the consideration payable under the final system plan." United States' brief at 39.

The New Haven Trustee concurs with that view of the United States, so far as it goes. Aside from the RRRA being inadequate from the point of view of compensation when analyzed as a taking statute, it is also deficient insofar as §§303(b) and (c) require the Special Court to order conveyances willy-nilly, before determining whether the final system plan certified by USRA is "fair and equitable," and permit only a subsequent review of the merits or lack thereof of the final system plan under the fair and equitable rubric.[21]

On this issue, *Catlin v. United States*, 324 U.S. 229 (1945), discussed in the New Haven Trustee's brief as

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[21]Before the Special Court, the United States and USRA argued that the Special Court would, under the statutory time-table, have 110 days after Congressional approval of the final system plan before having to order transfer of the properties, and that such period could be utilized to review the *prima facie* fairness and equity of the plan. (The same argument as to timing is made here; see USRA's brief as Cross-Appellee at 30-31; 33 n. 29). The New Haven Trustee pointed out that the RRRA provides no procedure for that *prima facie* review and that the Government has it in its power to reduce the 110 days to 11 or 12 days. The Government continued to press its position before the Special Court, which has held that even 110 days would not afford it enough time to make a meaningful preconveyance decision as to whether the final system plan is fair and equitable to the Penn Central estate. Yet when it became expedient to adopt the argument that the 110 days could be shortened, the Government parties did so. See transcript of the hearing on September 19, 1974 before the Penn Central Reorganization Court, at 13,627-30. When it was pointed out that Congress was considering postponing the RRRA time-table by 120 days, the United States responded that the conveyance need be only slightly delayed because the Government could "speed up" the period between Congressional approval and transfer. *Id.* at 13,630.

Appellee (at 59 n. 50) is in point. *Catlin* involved an eminent domain statute under which the United States took property for military purposes. The statute provided for title to be vested in the United States in advance of any judicial determinations as to the legitimacy of the taking. The Court construed the statute to permit post-taking reconveyances of the property, saying:

> "The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity *or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity.*" 324 U.S. at 241 (emphasis added).

The United States argues that under §303(b) of the RRRA, once conveyances are ordered by the Special Court (apparently without any pre-conveyance appellate review), "reconveyance of all the rail properties would not be feasible" (United States' brief at 38 n. 17),[22] even if the Special Court finds in its subsequent §303(c) proceedings (a) that the final system is not fair and equitable, and (b) that none of the remedies provided by the RRRA suffice to cure the lack of fairness and equity. Such findings, if made by the Special Court, or if made by this Court on its §303(d) review of the Special Court's §303(c) decision, will mean that an unconstitutional final system plan will have become final and binding on the parties, who presumably are then remitted to a possible Tucker Act remedy in the Court of Claims. And, as previously shown (New Haven Trustee's brief as Appellee at 67-75), Congress

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[22]Contrary to note 17 of the United States' brief, the New Haven Trustee does not "assume . . . that reconveyance of all the rail properties would not be feasible." However, reconveyance, which might be required to rectify unconstitutional takings, would be much less desirable, both to private and public interests, than a pre-conveyance injunction.

could then act to prevent any Tucker Act remedy, either by repealing the sovereign's consent to suit or by refusing to appropriate the funds required to enable the Secretary of the Treasury to satisfy execution upon any Court of Claims judgment. The above-cited concession by the United States (United States' brief at 39) is fatal to its case. The lack of pre-conveyance judicial review (including appellate review here of any decision by the Special Court), based on actual knowledge of the terms of the final system plan, as to the fairness and equity of the mandatory conveyances as applied to individual railroads, such as Penn Central, takes property without due process of law, irrespective of whether or not the provisions for compensation in the form of securities of a public authority are valid.

PART TWO: LEGAL ANALYSIS OF THE SPECIAL COURT'S SEPTEMBER 30, 1974 DECISION, IN THE MATTER OF PENN CENTRAL TRANSPORTATION CO. (NO. 74-8)

I

PROCEDURAL STATUS OF SPECIAL COURT'S DECISION IN RELATION TO THE INSTANT APPEALS AND CROSS-APPEAL

On September 30, 1974, the Special Court, Regional Rail Reorganization Act (Henry J. Friendly, Presiding Judge, Carl McGowan and Roszel C. Thomsen, Judges) entered a conditional order reversing the Penn Central Reorganization Court's Order No. 1596[23] (JA 124-152), as well as that Court's Secondary Debtor decision (JA 153-56). The order of reversal was conditioned by a stay pending further order of the Special Court after a final determination by the Court of this cross-appeal and the related appeals (Nos. 74-165, 74-166, 74-167 and 74-168), and the Special Court reserved jurisdiction to modify its opinion and order in light of the decision of the Court.

The Special Court refused to give *res judicata* or collateral estoppel effect to the prior judgment of the three-judge district court below in *Connecticut General Ins. Corp. v. United States Railway Ass'n.* and related cases which are the subject of these appeals and cross-appeal; at the same time, the Special Court has indicated that it will give preclusive effect to the Court's decision herein:

"We also state, for whatever bearing it may have, that the last thing we have in mind is to impair in

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[23]The Special Court left in effect the Reorganization Court's Order No. 1543, from which no appeals were taken except the New Haven Trustee's appeal limited to jurisdictional issues. The findings of fact in support of Order 1543 are accordingly still in effect.

> any way the [Supreme] Court's freedom of action in the *Connecticut General* appeal." *In the Matter of Penn Central Transportation Co.*, Special Court, Regional Rail Reorganization Act, Nos. 74-8 *et al.*, September 30, 1974, slip opinion by Friendly, J., at 35.

Because of the potential importance of the Special Court's analysis of the RRRA, and the conflict between its view of the constitutional safeguards afforded to claimants to the Penn Central estate by the Fifth Amendment and that of the *Connecticut General* court, the New Haven Trustee has included in this Reply Brief an analysis of the Special Court's decision, indicating both the areas with which the New Haven Trustee is in accord and the areas in which the New Haven Trustee respectfully submits that the Special Court was in error. In the following discussion, however, the New Haven Trustee will refrain from any extensive analysis of the evidenciary conclusions of the Special Court based on its record, which is not before the Court at this time and is not relevant to the decision of the constitutional issues presented for decision on the appeals and cross-appeal. Since the Special Court has indicated that its decision ultimately will be guided by the Court's decision of the instant cross-appeal and the related appeals, a definitive conclusion by the Court of the legal issues properly posed by the summary judgment motions of the plaintiffs below and here, in the context of the appeals and cross-appeal, is both legally warranted and of extreme importance to the public and private interests involved. The New Haven Trustee submits that the Court should hold that the RRRA is unconstitutional, either by sustaining the judgment of the court below or by reversing that judgment on the grounds urged by the New Haven Trustee in this cross-appeal; if the Court so holds, the Special Court will be required by its own

indication to enter an order affirming the §207(b) order (Order No. 1596) of the Penn Central Reorganization Court. Thus, the matter will have been properly and expeditiously decided as requested by all the parties in the joint motion for expedited treatment.

The Special Court's decision did not, of course, constitute a reversal of the judgment of the three-judge district court convened under 28 U.S.C. §§2282 and 2284; only this Court has appellate jurisdiction to hear appeals from a judgment declaring an act of Congress unconstitutional. While the Special Court's conclusions as to the existence of a Tucker Act remedy are in apparent disagreement with the court below, it is submitted that the Special Court was in error, as more fully developed in the following analysis of Judge Friendly's Opinion. See *infra* at 47-48 for a discussion as to the grounds upon which the decision of the Special Court may properly be remedied by the Court, and as to the appropriate procedural dispositions to be made in this case.

II

ANALYSIS OF SPECIAL COURT'S OPINION

The Special Court's Opinion relating to Penn Central consists of an introductory section (at 1-26) plus eight numbered sections dealing with discrete issues, each of which is summarized below.

A. *Introduction* (1-26)

This section contains a general statement of the case (at 1-10) and summary of the RRRA (at 11-26). Aside from the point noted below,[24] the summary is largely accurate.

B. *Jurisdiction* (26-32)

The Special Court's Opinion does not, it is submitted, correctly address the Article III issues raised by the New Haven Trustee. The New Haven Trustee did not argue that the "case or controversy" was lacking because of the lack of adversary pleadings (Opinion at 27). The following head note of the New Haven Trustee's brief in the Special Court summarized the argument actually made on this point:

> "Even if §207(b) is interpreted not to confer new jurisdiction upon a §77 court, it requires an Article III court to exercise legislative and administrative functions and to issue an advisory opinion."[25]

The New Haven Trustee cited the following cases in support of that contention: *National Mutual Ins. Co.*

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[24]See Opinion at 24, n. 20, stating that "it is common knowledge" that the labor protective conditions in the Penn Central merger were a cause of the Penn Central debacle. It is unlikely that this was a significant cause, particularly as compared with the crew-consist issue, as to which see n. 21. The RRRA provides no relief from excessive and needless costs in the crew-consist area.

[25]Brief of New Haven Trustee, Appellant as to jurisdictional issues, before the Special Court (No. 74-8), August 2, 1974, at 11.

v. Tidewater Transfer Co., 337 U.S. 582 (1949); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting, explaining the position of a majority of the Justices in the *Tidewater Transfer* case); *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., concurring: "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements, or, what in some instances may amount to the same thing, without regard to them.").

The Special Court's Opinion fails to address the arguments actually made by the New Haven Trustee. The applicability of the cases cited above are not discussed at all. Further, the decision of the Special Court as to the Tucker Act remedy is in fact an advisory opinion in the sense that it will not be a final judgment unless Congress, upon reviewing the situation, decides that it is willing to contemplate the entry of a deficiency judgment against the United States in the Court of Claims.[26] We respectfully disagree that *McGrath v. Kristensen*, 340 U.S. 162 (1950) is the answer to the New Haven Trustee's contention that §207(b) called for an advisory opinion as to a matter upon which Congress retains the ultimate power of decision in §208. The New Haven Trustee cited *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) and more recent authority, such as *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) for the proposition that §207(b) called for a non-judicial decision as to a matter subject to legislative revision. Indeed,

[26]Congress may act to preclude a Tucker Act judgment of substantial amount either by vetoing all final system plans submitted to it under §208(a), or by amending the RRRA to limit expressly the potential liability of the United States. Neither of these steps would constitute a repeal of the Tucker Act; but each would effectively make the United States immune to suit, or limit the aggregate dollar amount of any liability to which Congress chooses to expose the Treasury.

the indication that the Special Court may not have the power to bind the Court of Claims (Opinion at 106 n. 109[27]) as to the existence of any substantive cause of action, or as to the amount of damages if there be such a cause of action, makes its entire Tucker Act remedy discussion (see Sections VII and VIII, at 83-117) an advisory opinion, contrary to both Article III limitations and the Court's holdings in *United States v. Sherwood*, 312 U.S. 584 (1941) and *United States v. King*, 395 U.S. 1 (1969).

Finally, the Special Court disposed of Part II of the New Haven Trustee's brief on jurisdictional issues[28] on the ground that it "falls by the wayside" in view of the pendency of these appeals before the Court. (Judge Friendly's Opinion at 31-32). Since the New Haven Trustee was contending that the RRRA improperly affected the outcome of a case or controversy (his §77(g) Motion) which was pending at the date of enactment of the RRRA, a matter which is not now before the Court, the Special Court erred in dismissing this contention. The New Haven Trustee cited *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), *Battaglia v. General Motors Corp.*, 169 F. 2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948), *Lockerty v. Phillips*, 319 U.S. 182 (1943), and *Yakus v. United States*, *supra*, in support of his position that §207(b) was repugnant to the Constitution insofar as it purported to withdraw the Reorganization Court's power to dismiss the re-

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[27]Note 109 reads: "We intimate no opinion to what extent, if at all, the Court of Claims would be bound by our determination as to the value either of the compensation issuable under the Act or of the assets conveyed." See *infra* at 44-46 for a discussion of this point.

[28]This argument was headnoted:

"§207(b) Confers New Jurisdiction Upon the Reorganization Court and this Court, and Withdraws Jurisdiction from the Supreme Court, in a Designed Attempt to Dictate a Rule of Decision in a Pending Case, the New Haven Trustee's §77(g) Motion." (at 28).

organization proceedings under §77(g) of the Bankruptcy Act. The New Haven Trustee further contended that the latent power to dismiss under §77(g) is the constitutional "safety-valve" under which secured creditors of Penn Central have been restrained from exercising their contractual rights for over four years. The Opinion addresses none of these contentions; and yet the Special Court's order expressly prohibits entry of an order under §77(g) by any of the reorganization courts.

C. *Collateral Estoppel* (32-35)

The Special Court was admittedly faced with a situation not contemplated by Congress when it established the Special Court and required it to render an appellate decision in a number of distinct cases arising from appeals of orders of reorganization courts under §207(b). Prior to the decisions by the respective reorganization courts, a three-judge federal court with jurisdiction of the subject matter and the persons of most of the parties to the Penn Central proceeding had adjudicated that the RRRA was void in certain respects for repugnance to the Constitution; and that decision was on appeal and cross-appeal to this Court. The Penn Central Reorganization Court in its §207(b) decision, Opinion and Order No. 1596, seems not to have given the *Connecticut General* decision binding effect, but Judge Fullam explained that this was necessitated by the refusal of a majority of the three judges to reach and decide the issue of the constitutional validity of the compulsory conveyance provisions (JA 125).[29] Judge Friendly, however, declares that the Special

[29] Judge Fullam, concurring below, stated that:

"The policies embodied in 28 U.S.C. §2282 appear applicable in this case. . . . It is preferable that the deliberate and collegial judgment of this three-judge court should determine the constitutionality of the RRRA's conveyancing provisions." (JA 59).

Court is not bound even by decisions of the duly constituted §2284 court on issues which it did reach—such as the non-availability of a Tucker Act remedy. The ground cited is that Congress did not intend that the Special Court's decision could be governed by a prior decision of another district court. Yet, it is undisputed that Congress left 28 U.S.C. §§2282 and 2284 in effect as to any complaint asserting that an act of Congress is unconstitutional.[30] Moreover, irrespective of Congress' intent, a duly constituted Article III court has already declared that the RRRA is unconstitutional and is not saved by the alleged existence of a Tucker Act remedy; and that court's decision is reviewable *only* by this Court. In upholding a collateral attack upon the prior holdings of a court with clear jurisdiction of the subject matter, the Special Court has seemingly assumed that it has jurisdiction to set aside the judgment of the §2284 Court. Recognizing that, without more, a non-appealable decision by the Special Court might itself be viewed as a final disposition of issues, such as the constitutionality of the RRRA and the alleged existence of a Tucker Act remedy, a wholly untenable position, the Opinion (at 34) declares that "great cases often demand departures from procedural rules" otherwise applicable. The Opinion asserts that because of the alleged non-reviewability of the Special Court's decision (based on the last sentence of §207(b), a provision which the New Haven Trustee contends is itself void under Article III) its decision should not be permitted to have a preclusive effect on this Court in the instant cross-appeal and related appeals. By accepted jurisprudential standards, the Special Court should

[30]On March 25, 1974, the Judicial Panel on Multidistrict Litigation denied the attempt of the governmental parties herein to transfer all constitutional litigation under the RRRA to the Special Court. *In re Litigation under the Regional Rail Reorganization Act of 1973*, Docket No. 166 (J.P.M.L. March 25, 1974). See *supra* at 4, n. 1.

have deferred to the holding of a fellow district court of the United States in a case in which, though the decision was under appeal as to its merits, the other court had clear jurisdiction of the subject matter and the parties. See Hart & Wechsler, The Federal Courts and the Federal System (2d Ed. 1973) at 1232-34.[31] See also *New Haven Inclusion Cases, supra,* 399 U.S. at 419-30.

D. *The Requirement of Uniformity* (35-37)

In the *Connecticut General* decision, a majority of the court (Judges Fullam and Bechtle) held that the RRRA is invalid insofar as it rests on the Bankruptcy Clause because it is not, on its face, a uniform law on the subject of bankruptcies. Judge Aldisert agreed that the RRRA failed to comply with the uniformity requirement, but reasoned that creditors of Penn Central, who are treated alike regardless of where they reside, lack standing to raise the constitutional defect of want of uniformity. The Special Court, having decided that it was not bound by the *Connecticut General* decision, adopted the position of the United States and USRA, that had also been advanced by them below and rejected without discussion by the §2284 court, that the RRRA is uniform legislation due to the happenstance that all active railroads in reorganization were, on January 2, 1974, located in geographical areas which are within the defined region. It is respectfully submitted that the Special Court's disposition of the uniformity issue was in error.

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[31] "Should it be a postulate of federal judicial administration that there ought to be no more than one trial of a controversy between the same parties at the same time in the federal courts, and that accordingly, when duplicating actions of this kind are instituted, the only problem is to decide which action should be allowed to proceed?" *Id.* at 1232.

E. *Fair and Equitable Process—General Considerations* (37-41)

The Special Court in this section of its Opinion has made some general observations[32] which are pertinent only to the inquiry which the Special Court was engaged in: a determination whether the process of the RRRA will be fair and equitable. The Special Court correctly pointed out that if the RRRA is unconstitutional as to any non-severable provision, it must be held not fair and equitable. It is for this reason that the Special Court's ultimate judgment cannot stand if the Court sustains the holding below as to uncompensated interim erosion, or if the Court accepts the argument of the New Haven Trustee that the compulsory conveyance provisions are unconstitutional.

F. *Erosion of Investors' Rights* (41-57)

The Special Court wholly disagreed with the *Connecticut General* court's handling of the interim erosion issue. The Special Court's view of erosion is based on the authority of Judge Friendly's 1969 opinion in the New Haven proceedings,[33] which is cited (Opinion at 44) to sustain the proposition that Penn Central

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[32]The New Haven Trustee must respectfully disagree with one of the Special Court's observations:

> "The idea that billions of dollars of liquidation proceeds of these bankrupt railroads are lurking just around the corner is unrealistic in the last degree." Opinion at 39.

This statement, carried to its logical conclusion, would mean that Penn Central will be a "bankrupt bankruptcy," unable to pay even its priority administration claims, now in excess of $1 billion. It also casts grave doubt upon there being any Tucker Act remedy.

[33]In *New York, N.H. & H. R.R., First Mortgage 4% Bondholders' Committee v. United States*, 305 F. Supp. 1049, 1055-59 (S.D.N.Y. 1969), *rev'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 419-30, a three-judge district court headed by Judge Friendly approved two "discounts" on liquidation value of New Haven's rail assets imposed by the ICC (334

(footnote continued on following page)

could not achieve a termination of operations except after lengthy proceedings before the ICC. It is submitted that the earlier case is improperly cited, and that the Court's opinion in *New Haven Inclusion Cases*, 399 U.S. at 461, did not affirm the decision of the three-judge court headed by Judge Friendly. The Court did not even pass on the merits of Judge Friendly's earlier opinion, because it ruled that the three-judge Court headed by Judge Friendly should have deferred to the New Haven's reorganization court (Anderson, J.).[34]

Part IV of the Opinion is accordingly premised on the erroneous legal concept that the public interest is entitled to two "bites of the apple,"[35] the first comprising the period during which creditors can constitutionally be restrained while efforts to reorganize the railroad are explored, and the second, a period in which the ICC and the state regulatory agencies can process abandonment applications in the usual and

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(footnote continued from prior page)

1.C.C. 25 (1968)), one based on an assumed one-year delay by the ICC in acting upon a hypothetical abandonment application (the granting of which, the court held, would have been constitutionally required) and the other a "bulk sale" discount, based on an alleged risk factor that a hypothetical buyer of properties in bulk would have discounted for if he purchased the properties at the date the ICC finally approved the hypothetical abandonment application. Judge Weinfeld dissented on both points, 305 F. Supp. at 1066-69. The New Haven's reorganization court rejected these discounts imposed by the ICC. *In re New York, N.H. & H. R.R.*, 304 F. Supp. 793, 800 (D. Conn. 1969), *aff'd sub nom. New Haven Inclusion Cases, supra*, 392 U.S. at 457-73.

[34]Had the Court passed on the merits of Judge Friendly's opinion in 305 F. Supp. at 1055-59, it would have reversed. This is abundantly clear from the dissenting opinion of Justices Black and Harlan, who would have reviewed the decisions of both district courts and sustained the discounts imposed by the ICC, thereby affirming Judge Friendly's opinion at 305 F. Supp. at 1055-59. See *New Haven Inclusion Cases, supra*, 399 U.S. at 502.

[35]*In re New York, N.H. & H. R.R., supra*, 304 F. Supp. at 801, quoted, with approval, *New Haven Inclusion Cases*, 399 U.S. at 466.

customary fashion as though no Fifth Amendment rights were at stake. It is further submitted that *Palmer v. Massachusetts*, 308 U.S. 79, 88 (1939) does not stand for the proposition for which it is cited in the Opinion (at 44). *Palmer* is clearly applicable during the period prior to a finding that the railroad is not reorganizable on an income basis within a reasonable time, but its applicability thereafter is doubtful in the light of *New Haven Inclusion Cases.*

Judge Fullam has found Penn Central not to be reorganizable on an income basis under §77; all parties to this cross-appeal and the related appeals agree with that conclusion. Earlier the ICC had found that Penn Central could be reorganized only with massive government aid.[36] By taking the position that the ICC can in the public interest subject a railroad in reorganization to a kind of "one last chance" doctrine (in Judge Friendly's words, "a final opportunity to come up with plans that may prevent serious injury to the public interest"—Opinion at 44), the Special Court has undermined the doctrine of the *Brooks-Scanlon* line of cases,[37] while at the same time giving lip service to its continued vitality.

Having incorrectly determined the law applicable to erosion and the right of creditors to demand a reasonably prompt cessation of deficit rail operations once it has been determined that the railroad is not reorganizable, the Opinion then compares the effect of the RRRA, particularly §304(f), to the prospects "that would have prevailed in its absence." (Opinion at 47).

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[36] *Penn Central Transportation Company Reorganization*, Report on Reorganization Plans, Finance Docket No. 26241 (ICC, September 28, 1973), J.D.S. 54.

[37] *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513 (1921); *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924).

Assuming that the Fifth Amendment notwithstanding, Congress and the ICC could subject Penn Central to the task of proving no adverse environmental impact as a result of a total cessation of service, see *Harlem Valley Transportation Ass'n. v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd.*—F. 2d—(2d Cir. 1974), Judge Friendly concluded that the RRRA by making the National Environmental Policy Act of 1969 ("NEPA") inapplicable (RRRA, §601(c)), simply replaces one burdensome set of regulatory hurdles to abandonment with another. It is submitted that this conclusion is incorrect. The Opinion does not deal with the argument that NEPA itself would be unconstitutional if it prevented, or unduly delayed, a decision permitting cessation of operations to which the Penn Central creditors would be otherwise entitled by reason of the Fifth Amendment.

Turning to a factual discussion of the erosion issue, the Special Court first defines erosion incompletely,[38] and then asserts that there is no "convincing evidence" in the record that erosion is likely in the 620 days (which has now become 740 days, see USRA's brief as Appellee at 3 n. 1) prior to the first date a final system

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[38]Judge Friendly's minimum definition of erosion includes issuance of trustees' certificates, deferral of property taxes, accrual of other administration expenses, and use of cash or property subject to mortgages for payment of operating expenses. Opinion at 51. Each of these elements is a consequence of continued net losses from operations; but such net losses produce other forms of erosion. In any event, the minimum definition fails to treat with the following elements of erosion: decline in value of railroad equipment due to retirements in excess of depreciation reserves; the excess of depreciation of equipment and of track and structures, to the extent that it reflects actual wear and tear and obsolescence, over new investment therein; borrowings otherwise than on trustees' certificates from the Government and its agencies to the extent used to defray operating expenses in excess of revenues from rail operations; and diversion of non-rail income from real estate and investments to defray operating expenses.

plan can become effective.[39] Not only does the Opinion fail to treat with the evidence of erosion in the record (such evidence consisting primarily of undisputed facts that are stipulated in this proceeding), but it seemingly reverses the trial court's findings of fact in Opinion and Order No. 1543 (JA 84-103) without any determination that they are erroneous under the standard for appellate review and in a situation where neither the Government nor USRA had appealed Order No. 1543. Judge Fullam found that Penn Central will have *negative* cash available for operations of $153,700,000 at December 31, 1975, a date which is within the 740 days allowed for a final system plan to become effective. Opinion and Order No. 1543, Finding of Fact No. 26 (JA 99-100). *Negative* cash of this magnitude necessarily will require the financing of *cash* deficits by borrowings having the priority of administration claims.

The Opinion as to erosion indicates that the Special Court viewed its role under §207(b) of the RRRA as one calling for a trial *de novo*, not an appellate proceeding. It appears that the Special Court considered that it could reach its own conclusions without regard to the factual findings of the reorganization courts.[40] In the erosion discussion, the Opinion places great weight on the 10% temporary rate increase granted by the ICC in *Ex Parte 305* (see Opinion at 52 and n. 44, 45)

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[39]The court below correctly granted summary judgment on the ground of uncompensated interim erosion, treating the Stipulation as to Factual Matters and the uncontested findings of fact of Judge Fullam in Opinion and Order No. 1543 (JA 84-103) as conclusive evidence that some erosion was likely in the 620 days preceding the effective date of any final system plan.

[40]Thus, in a later section (Opinion at 70-83), the Special Court decides how much weight it considered appropriate to give to the respective witnesses on Conrail viability, without regard to the findings of the respective reorganization courts.

and even concludes, based on the month of July, 1974 (a month following the trial court's decision)[41] that Penn Central's operations will now be profitable (on the basis of net railway operating income, not net income after fixed charges). See Opinion at 54 n. 49. The Special Court, which was plainly given an appellate function by §207(b), erred when it applied its own views to the facts of the case *de novo*.[42]

G. *The Compelled Conveyance and the Adequacy of the Consideration* (57-83)

The New Haven Trustee agrees with the Special Court's analysis of §§302 and 303 of the RRRA as the product of congressional reasoning which was too "simplistic" (Opinion at 61); and with the observation:

> "The mere fact, if it be one, that Conrail might make *some* profit would not necessarily give its securities a value sufficient to render them fair compensation." *Id.* (emphasis in original; footnote omitted).[43]

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[41]Section 207(b) of the RRRA required a decision by the reorganization courts not later than July 1, 1974, and accordingly reliance upon evidence arising after that date by an appellate court is improper.

[42]On review of the §2284 court's decision, this Court's role is of course limited to the determination of whether the trial court's judgment is supported by substantial evidence. As Mr. Justice Stewart observed in *New Haven Inclusion Cases, supra*:

> "It is not for us to pass upon the myriad factual and legal issues as though we were trying the cases *de novo*. 'It is not enough to reverse the District Court that we might have appraised the facts somewhat differently. If there is warrant for the action of the District Court, our task on review is at an end.' " 399 U.S. at 435, quoting *Group of Institutional Investors v. Chicago, M., St. P. & Pac. R.R.*, 318 U.S. 523, 564 (1943).

[43]If the Special Court's observation (Opinion at 60) that:

> "Congress is entitled to insist on the continued operation of rail lines earning or capable of earning a profit. . ." (footnote omitted)

(footnote continued on following page)

The New Haven Trustee agrees with the analysis of the deficiencies of §303(c)(2) of the RRRA (Opinion at 62-67); that section "fails to supply an adequate tool with which to cure any deficiency in the consideration." (Opinion at 67).

Thus, the Special Court found that, absent a Tucker Act remedy, the process of the RRRA is not fair and equitable (Opinion at 68-69), since there was no showing that the combination of Government guaranteed obligations, the securities of Conrail and the "other benefits" would provide just compensation. (Opinion at 69-83).[44]

(footnote continued from prior page)

means that Congress is entitled to insist on continued operation of a line or segment of railroad so long as that line or segment makes a positive rather than negative contribution to net railway operating income, even if not sufficient to provide any return on invested capital, then it is far too broad and not supported by the Court's modern decisions, such as *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[44]It is appropriate to note in passing that the entire discussion of Conrail viability (Opinion at 69-83) is based on a *de novo* trial approach, rather than appellate review of evidence in the record; and this error is compounded by the use in the Penn Central case of evidence from the Ann Arbor case which was never subjected to cross-examination. See Opinion at 80-81. Considered as a *de novo* trial, the proceedings before the Special Court were unfair to the Penn Central estate and its creditor and stockholder claimants, and violated due process of law, because no opportunity was afforded to parties who submitted evidence as to Conrail's non-viable status to introduce evidence or to cross-examine evidence relied upon by the Special Court. Not only was the decision in the appeal from the Penn Central Reorganization Court decided on the basis of evidence *dehors* the record in that proceeding, but the Government and USRA in effect disavowed the Ann Arbor evidence on the ground that it is not possible at this time to know what form Conrail will take, thereby requiring all predictions as to its viability to be based on assumptions which cannot be verified. See transcript of hearings before the Special Court at 85, 88, 91-92. Moreover, the states of Wisconsin and Michigan, which introduced evidence as to Conrail's potential viability in the Ann Arbor proceeding, where, by agreement, it was not subjected to cross-examination, had standing to introduce the same evidence in the Penn Central proceedings (where it would have been subject to cross-examination) and did not do so.

H. *Availability of a Remedy Under the Tucker Act* (83-102)

The Special Court's analysis of the Tucker Act remedy issue is exclusively premised upon the conclusion that the *jurisdiction* of the Court of Claims was not repealed, expressly or impliedly, by the RRRA. The New Haven Trustee submits that the judgment below, that there is no Tucker Act remedy, is sound whether or not the jurisdiction of the Court of Claims was repealed.

The Special Court stated that its disagreement with the *Connecticut General* court was that the court stated the wrong issue; according to the Opinion, the issue is whether Congress expressed an affirmative intent "to withdraw a remedy that would otherwise exist." Opinion at 85. The Opinion thus fails to differentiate between (a) affirmative intent to withdraw the consent of the sovereign to suit and withhold jurisdiction affirmatively granted in 28 U.S.C. §1491 to the Court of Claims, and (b) assuming that the waiver of sovereign immunity and conferral of jurisdiction are still in effect, affirmative intent to preclude any plaintiffs from being able to prosecute a substantively valid cause of action in the Court of Claims.[45]

The Opinion does not discuss any of the cases relied on by the New Haven Trustee in his Tucker Act remedy analysis save *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which is dismissed with the observation:

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[45]The Court of Claims has itself recognized this critical distinction, pointing out that: "... it is not every claim involving or invoking the Constitution, a federal statute or a regulation which is cognizable here." See *Eastport S.S. Corp. v. United States*, 372 F. 2d 1002, 1007 (Ct. Cl. 1967), quoted in New Haven Trustee's brief as Appellee at 38-40.

"The basis of the doubt [as to adequate remedy at law in the Court of Claims for the seizure of the steel mills] was that the Executive's action there was without authorization in law." Opinion at 102, n. 106.

The Special Court thus did not address the New Haven Trustee's contention that *Youngstown* has a different meaning which is to be derived from the Court's citation in *Youngstown* of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).[46] So far as the New Haven Trustee can discover, no case has ever held that an *unconstitutional* taking has an adequate remedy at law in the Court of Claims, although there are legions of inverse eminent domain cases holding that a constitutional taking which is inadequately compensated gives rise to a valid cause of action under the Tucker Act.

The Opinion correctly discounts the applicability of *Hurley v. Kincaid, supra*, to the problem at hand (Opinion at 94-99), but then relies upon another opinion of Mr. Justice Brandeis, *Lynch v. United States*, 292 U.S. 571 (1934) (Opinion at 99-102). *Lynch* involved an unusual action by Congress which came very close to repudiation of the public debt, just as the RRRA involves an unprecedented attempt by Congress to exercise the power to cancel the contractual rights of mortgage bondholders.[47]

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[46] *Youngstown* is a case where equitable relief was deemed appropriate because the governmental action complained of was unconstitutional, thereby qualifying under the test of *Larson* (as explained in *Malone v. Bowdoin*, 369 U.S. 643 (1962)) for the applicability of the doctrine of *United States v. Lee*, 106 U.S. 196 (1882). *Youngstown*, and numerous other cases which relied on the *Lee* decision, stand in contrast to cases where the government action alleged to constitute a taking is conceded by the condemnee to be constitutional (*e.g.*, *Hurley v. Kincaid*, 285 U.S. 95 (1932); *United States v. Causby*, 328 U.S. 256 (1946); and *Larson*).

[47] The *Lynch* opinion casts doubt on the availability of a substantive cause of action in the Court of Claims by its holding that Congress retains the power to withdraw the consent of the sovereign to suit. See 292 U.S. at 581-82.

I. *The Adequacy of the Remedy Under the Tucker Act* (102-116)

The Opinion (at 104) cites *Bauman v. Ross*[48] for the proposition that Congress is not bound to provide compensation in money or its perfect equivalent for a taking under the eminent domain power. It is submitted that *Bauman v. Ross* holds only that if the condemning authority's activity will benefit land of the condemnee not taken, that benefit may be taken into account in determining the condemnee's loss as to the land which is taken. *United States v. 1,000 Acres of Land, More or Less, in Plaquemines Parish, La.*,[49] stands for the same proposition. The extravagant dictum contained in the latter opinion, quoted by the Special Court (Opinion at 105), cannot be reconciled with recent decisions of the Court.

At most, the cases cited in the Opinion (at 104-105) stand for the proposition that "other benefits" conferred upon a condemnee by the sovereign may be taken into account in determining a condemnation award. It is doubtful that the RRRA confers "other benefits" upon the holders of railroad mortgages, and it is likewise doubtful that "other benefits" are conferred upon the Penn Central estate. The privilege to discontinue common carrier operations, which is a right conferred by the Fifth Amendment, is not such an "other benefit."

The Opinion adverts to the problem posed by the *Sherwood* and *King* cases, *supra*, barring an effective declaratory judgment by the Special Court in its §303(c) proceedings that could be binding on the Court of

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[48]167 U.S. 548 (1897).

[49]162 F. Supp. 219 (E.D. La. 1958).

Claims, but never reveals the Court's judgment on this issue. Opinion at 106 n. 109. Under *Sherwood* and *King*, the Special Court's §303(c) judgment as to the existence of a "shortfall" for which a remedy exists in the Court of Claims will be an advisory opinion binding on no one. Rather than being an "exercise in literalism" (Opinion at 102 n. 106), the contention that the Special Court should not have even considered the Tucker Act remedy was well founded in the doctrine of sovereign immunity discussed in the *Sherwood* and *King* cases.

The New Haven Trustee agrees that marketable debt instruments guaranteed as to principal and interest by the United States may be, in fact, the perfect equivalent of money if they carry a current market rate of interest. The issue, however, is whether a "shortfall" remedy in the Court of Claims is adequate (assuming it exists as a valid cause of action) if it compensates only for the difference between condemnation value of the property, on the one hand, and a theoretical value of Conrail securities plus $500 million of Government guaranteed obligations, on the other. Conrail's securities may in fact have a market value much less than the amount which is determined to be their "face value" for issuance in a reorganization. The nub of the controversy here is whether market value or so-called "intrinsic" value will govern. If the Court of Claims were to accept the Special Court's "shortfall" rationale, there might, in fact, be no recovery in the Court of Claims for the difference between the "intrinsic value" of Conrail's securities and their actual market value.[50]

[50]The RRRA is uniquely burdensome in this regard because the securities will be valued by the Special Court many years before they are likely to achieve the status of a publicly traded security. For example, §77 plan proceedings for Penn Central that will result in distribution of the condemnation proceeds, might well take the better part of a decade, con-

(footnote continued on following page)

The Opinion advances the proposition that there can be a statute which, while not valid as a Bankruptcy Clause enactment alone, is valid as a Bankruptcy Clause enactment if supplemented by an eminent domain power. The same statute is both a "reorganization" and a "taking" at one and the same time, so that even though it would be invalid solely as a reorganization or solely as a taking, it is valid as an amalgam of the two. (Opinion at 105-108).

The Bankruptcy Clause and the eminent domain power have never before been considered to complement one another, so that a statute which fails as a reorganization law because it provides securities of insufficient value, and fails as an eminent domain law because it pays compensation otherwise than in money or its perfect equivalent, can be held valid because of a remedy in the Court of Claims.

(footnote continued from prior page)

sidering the multitude of proofs of claim filed and Penn Central's extraordinarily complex debt and lien structure. And the §77 plan proceedings cannot even begin until after completion of "horrifyingly" long valuation proceedings in the Special Court, appellate review by the Court, and then a lengthy Court of Claims proceeding. Thus, under the statutory scheme of superimposing the RRRA on §77, a traditionally lengthy process has become a modern day equivalent of Charles Dickens' *Jarndyce v. Jarndyce*, and the "escape valve" based on unreasonable delay (§77(g)) has been removed. If, as is likely, the 21st century will have been closely approached, or even reached, before the Conrail securities will be available for distribution, it is clear that their fair market value when received may be far less than the "intrinsic" value determined by capitalization of projected earnings. Even if the Penn Central Trustees could shorten this process by securing Reorganization Court approval to sell the Conrail securities, such sale would presumably have to await conclusion of a Tucker Act deficiency judgment proceeding. Unless Conrail had reported substantial net income for one or more years, it is unlikely as a practical matter that an underwritten public offering of Conrail's common stock could take place, particularly in the light of disclosure requirements of the Securities Act of 1933. Accordingly, there may not be a public market where Conrail's securities can be traded, and thus no way to ascertain their fair market value.

CONCLUSION

Based on the foregoing, it is the position of the New Haven Trustee that:

1. The decision of the court below in *Connecticut General* should be affirmed insofar as it relates to the interim taking;

2. The court was correct in concluding that an adequate Tucker Act remedy is not available to cure the constitutional defects of the RRRA;

3. The court was correct in concluding that insofar as the RRRA is a law on the subject of bankruptcies it is in violation of the constitutional requirement of geographical uniformity;

4. The decision of the court below should be reversed, as requested in this cross-appeal, insofar as it failed to enjoin implementation of the compulsory conveyance provisions of the RRRA on the ground that they effect a taking of private property for public use without just compensation;[51] and

5. In deciding this cross-appeal and the related appeals the Court can properly disregard the Special Court's §207(b) decision on the ground that the decision below in *Connecticut General* was binding as to the constitutional issues decided and that, in other respects, the decision of the Special Court is not relevant to the issues here before the Court.

The order sought here by the New Haven Trustee will presumably cause the Special Court to modify its §207(b) order dated September 30, 1974 so as to affirm Order No. 1596 of the Penn Central Reorganization Court (JA 152), thus precluding application of the RRRA to Penn Central.

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[51]See New Haven Trustee's brief as Cross-Appellant at 107-09 for the precise terms of the order requested.

If after hearing argument of the instant appeals and cross-appeals, the Court were to consider that the RRRA is facially constitutional as to both its interim erosion and compulsory conveyance aspects, there would still remain issues determined by the Special Court as to the fairness and equity of the process of the RRRA, which urgently require review because of their constitutional implications. The record in the Special Court's §207(b) proceedings would then be required in order to adjudicate definitively all aspects of the case, including the issue of availability of a substantively adequate Tucker Act remedy, and it would be proper for the Court to withhold its decision in these cases pending a decision to review, pursuant to a writ of certiorari to the Special Court under 28 U.S.C. §1651, the Special Court's §207(b) order;[52] in such event, the petition for review of the Special Court's order could be consolidated with the instant appeals and cross-appeal for decision on the merits. The Court would thus be in a position to review the issue of whether or not the RRRA provides a process which is fair and equitable, an issue which must be reached in the event that the Court determines that a Tucker Act action exists, but otherwise need not be decided.

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[52]The New Haven Trustee plans to file with the Court, as soon as possible in the premises, such a petition for a writ of certiorari under 28 U.S.C. §1651 to review the Special Court's §207(b) order. The petition will assert that this Court has jurisdiction to issue the writ in aid of its appellate jurisdiction under §303(d); that there is no other statutory provision whereby the decision of the Special Court can be reviewed by the Court; that the last sentence of §207(b) of the RRRA purporting to preclude appellate review of the Special Court's §207(b) decision is void for repugnance to the Constitution; that §207(b) confers jurisdiction improperly in view of the constraints of Article III of the Constitution; and that the Special Court's decision on the merits was erroneous, based on errors of law and errors of fact.

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